No. 17-1106	
Title:	**Michael Sexton, Warden, Petitioner** **v.** **Nicholas Beaudreaux**
Docketed:	February 7, 2018
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(15-15345)
Decision Date:	September 18, 2017
Rehearing Denied:	November 8, 2017

DATE	PROCEEDINGS AND ORDERS
Feb 06 2018	Petition for a writ of certiorari filed. (Response due March 9, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Mar 09 2018	Brief of respondent Nicholas Beaudreaux in opposition filed. **Main Document** **Proof of Service**
Mar 09 2018	Motion for leave to proceed in forma pauperis filed by respondent. **Main Document**
Mar 27 2018	Reply of petitioner Michael Sexton, Warden filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 28 2018	DISTRIBUTED for Conference of 4/13/2018.
Apr 12 2018	Rescheduled.
Apr 16 2018	DISTRIBUTED for Conference of 4/20/2018.
Apr 18 2018	Rescheduled.
Apr 23 2018	DISTRIBUTED for Conference of 4/27/2018.
Apr 26 2018	Rescheduled.
May 07 2018	DISTRIBUTED for Conference of 5/10/2018.

May 09 2018	Rescheduled.
May 14 2018	DISTRIBUTED for Conference of 5/17/2018.
May 16 2018	Rescheduled.
May 21 2018	DISTRIBUTED for Conference of 5/24/2018.
May 23 2018	Rescheduled.
May 29 2018	DISTRIBUTED for Conference of 5/31/2018.
May 30 2018	Rescheduled.
Jun 04 2018	DISTRIBUTED for Conference of 6/7/2018.
Jun 06 2018	Rescheduled.
Jun 11 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 13 2018	Rescheduled.
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 27 2018	DISTRIBUTED for Conference of 6/27/2018.
Jun 28 2018	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 28 2018	Petition GRANTED. Judgment REVERSED and case REMANDED. Justice Breyer dissents. **Opinion** per curiam. (Detached **Opinion**)
Jul 30 2018	JUDGMENT ISSUED.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Peggy S. Ruffra	Department of Justice	4155103855

Counsel of Record	Office of the California Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102 Peggy.Ruffra@doj.ca.gov	
Party name: Michael Sexton, Warden		

Attorneys for Respondent		
Jamie Lee Moore Counsel of Record	Attorney at Law 700 Larkspur Landing Circle Suite 199 Larkspur, CA 94939 fedappeal@yahoo.com	(415) 272-2772
Party name: Nicholas Beaudreaux		

No.

In the Supreme Court of the United States

MICHAEL SEXTON, WARDEN,

Petitioner,

v.

NICHOLAS BEAUDREAUX,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
PEGGY S. RUFFRA*
Supervising Deputy Attorney General
BRUCE ORTEGA
Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(415) 510-3855
Peggy.Ruffra@doj.ca.gov
**Counsel of Record*

February 6, 2018

QUESTION PRESENTED

Whether the court of appeals violated the deferential review requirements of 28 U.S.C. § 2254(d) by setting aside a state conviction based on its de novo analysis of an ineffective-assistance claim, without fulfilling its obligation to consider whether fair-minded jurists could agree with the state court's contrary conclusion.

TABLE OF CONTENTS

Page

Petition for a Writ of Certiorari 1
Opinions and Judgments Below 1
Statement of Jurisdiction 1
Statutory Provisions Involved 1
Statement 2
Reasons for Granting the Petition 9
Conclusion 19

Appendix

Unpublished Ninth Circuit Memorandum Opinion
Beaudreaux v. Soto
Case No. 15-15345
Filed September 18, 2017 ..... 1a-8a

Ninth Circuit Order
Denying Rehearing
Beaudreaux v. Soto
Case No. 15-15345
Filed November 8, 2017 ..... 9a

United States District Court
Order Denying Petition for Writ of Habeas Corpus
Beaudreaux v. Soto
Case No. C 1300351 BLF (PR)
Filed February 5, 2015 ..... 10a-71a

California Court of Appeal
First District Appellate Court Opinion
People v. Beaudreaux
Case No. A130110
Filed July 22, 2011 ..... 72a-97a

TABLE OF CONTENTS
(continued)

Page

California Court of Appeal
First District Appellate Court Order
Denying Petition for Writ of Habeas Corpus
In re Beaudreaux on Habeas Corpus
Case No. A130110
Filed July 22, 2011 ..... 98a

California Supreme Court Order
Denying Petition for Review
In re Beaudreaux on Habeas Corpus
Case No. S195827
Filed October 12, 2011 ..... 99a

California Supreme Court Order
Denying Petition for Review
People v. Beaudreaux
Case No. S195831
Filed October 12, 2011 ..... 100a

California Court of Appeal
First District Appellate Court Order
Denying Petition for Writ of Habeas Corpus
In re Beaudreaux on Habeas Corpus
Case No. A137478
Filed January 10, 2013 ..... 101a

California Supreme Court Order
Denying Petition for Review
In re Beaudreaux on Habeas Corpus
Case No. S208146
Filed March 27, 2013 ..... 102a

TABLE OF CONTENTS
(continued)

Page

Trial Court Exhibits
People v. Beaudreaux
Alameda County Superior Court Case No. 160022
Judgment Entered August 28, 2009 .....103a

TABLE OF AUTHORITIES

Page

CASES

Cavazos v. Smith
565 U.S. 1 (2011) (per curiam) 10

Cullen v. Pinholster
563 U.S. 170 (2011) 8

Felkner v. Jackson
562 U.S. 594 (2011) (per curiam) 10

Harrington v. Richter
562 U.S. 86 (2011) ..... 6 *passim*

In re Reno
55 Cal. 4th 428 (2012) 6

Johnson v. Sublett
63 F.3d 926 (9th Cir. 1995) 14

Kimmelman v. Morrison
477 U.S. 365 (1986) 11, 12

Knowles v. Mirzayance
556 U.S. 111 (2009) 12

Manson v. Braithwaite
432 U.S. 98 (1977) 14-15

McDaniel v. Brown
558 U.S. 120 (2010) (per curiam) 10

TABLE OF AUTHORITIES
(continued)

Page

Neil v. Biggers
409 U.S. 188 (1972) 15

Parker v. Matthews
567 U.S. 37 (2012) 14

Perry v. New Hampshire
565 U.S. 228 (2012) 12, 13

Simmons v. Unites States
390 U.S. 377 (1968) 12

Stancle v. Clay
692 F.3d 948 (9th Cir. 2012) 6

Strickland v. Washington
466 U.S. 668 (1984) ..... 6 *passim*

United States v. Agurs
427 U.S. 97 (1976) 13

Woodford v. Visciotti
537 U.S. 19 (2002) (per curiam) 15, 17

Yarborough v. Gentry
540 U.S. 1 (2003) (per curiam) 10

STATUTES

28 U.S.C.
§ 1254(1) 1
§ 2254 1
§ 2254(d) 8, 9, 10, 14

TABLE OF AUTHORITIES
(continued)

Page

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) Pub. L. No. 104-132 110 Stat. 1214 (1996) ..... 1 *passim*

COURT RULES

United States Supreme Court Rule 35.3 1

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Michael Sexton, Warden of Corcoran State Prison, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals (App. 1a-8a) and the order denying rehearing and rehearing en banc (App. 9a) are unpublished. The judgment of the district court (App. 10a-71a) is unpublished. The California Court of Appeal's affirmance of the state criminal judgment on direct appeal (App. 72a-97a) is unpublished. The state court of appeal's denials of habeas corpus relief (App. 97a, 98a, 101a) are also unpublished.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on September 18, 2017. App. 1a. The court of appeals denied the State's petition for rehearing and rehearing en banc on November 8, 2017. App. 9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in pertinent part:

---

[1] Michael Sexton has succeeded J. Soto as Warden of Corcoran State Prison. Warden Sexton is substituted as the named petitioner in this case in compliance with this Court's rule 35.3.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence in the state court proceeding.

STATEMENT

1. Wayne Drummond accompanied Dayo Esho, Shandon Massey, and Ray Nkele at a bar in Berkeley, California, on the night of September 4, 2006. App. 73a. They encountered Brandon Crowder, whom Esho and Nkele knew, and respondent Beaudreaux. *Id.* Pointing to Drummond, Crowder told Beaudreaux, "'That's him. That's him.'" *Id.* Crowder and Drummond argued and went outside to "settle" it. *Id.* Esho, Massey, and Beaudreaux followed. *Id.* at 73a-74a.

Esho heard Beaudreaux say, "'I don't know how to fight, but I know how to use this metal.'" App. 74a. As Drummond and Crowder faced each other, Crowder called out, "'Yo, somebody handle this.'" *Id.* Beaudreaux held a gun at Drummond's neck. *Id.* Esho heard Beaudreaux tell Drummond, "'You need to give me your wallet right now.'" *Id.* Drummond pushed the gun away and began to run. *Id.* Beaudreaux fired the gun, the bullet striking Drummond in the hip. *Id.* at 74a-76a. Beaudreaux fol-

lowed Drummond but departed when Esho told him, "'[L]eave us alone.'" *Id.* at 74a.

Esho, Massey, and Nkele found Drummond lying on the ground. App. 75a. He was moaning, could not stand, slurred his words, and had vomited. *Id.* at 75a-76a. His friends thought he was drunk or in shock—not shot—and took him to Nkele's room. *Id.* Drummond died a short time later from the gunshot, which had penetrated his pelvis and a major blood vessel. *Id.* at 76a-77a.

The next afternoon, Esho, Massey, and Nkele identified Crowder to Berkeley police as the person who had argued with Drummond. App. 77a. Crowder told the police that he knew Drummond's shooter from middle school but that he did not know his name. *Id.*

On February 13, 2008—after seventeen months had passed and after Crowder had been implicated in another crime—Crowder identified Beaudreaux in a middle school yearbook photo and in a photo lineup as Drummond's shooter. App. 77a. The next day, the police showed Esho a display containing photographs of the faces of six men. *Id.* at 78a. Esho tentatively identified Beaudreaux's photo as that of the man who had shot Drummond, saying his photograph was the "'closest to the person who shot Wayne.'" RT 621-623. Six hours later, the police showed Esho a different six-person display that included an older photo of Beaudreaux, taken closer in time to the Drummond shooting, and quite difference in general appearance. *Id.* at 623-626; *see* App. 103a-104a (reproducing photo displays). Esho said Beaudreaux's photo was "'very close, based on my recollection of the events that occurred the night Wayne was killed.'" RT 625-626.

Police also showed Massey a photo lineup, different from the ones shown to Esho. RT 626-627. Massey appeared disinterested and hardly looked at the display, except to exclude someone other than Beaudreaux. *Id.* When shown another photo lineup two days later, also different from the ones shown Esho, Massey said that Beaudreaux's photo depicted a man with "similar characteristics" to Drummond's shooter. *Id.* at 627-629.

Beaudreaux and Crowder each were charged with the first-degree murder and attempted robbery of Drummond. CT 200-203. At Beaudreaux's preliminary hearing, Esho positively identified Beaudreaux as Drummond's killer. App. 78a.

2. a. At Beaudreaux's trial in 2009, Esho pointed him out in court as the gunman. App. 78a. Esho also testified that, when he saw the second photo lineup, he had been pretty sure Beaudreaux was the gunman but that he could not be 100 percent sure based only on a photo. RT 713-714. He further testified that he had told the police he wanted to see Beaudreaux in person to be sure; and that he had become sure at the preliminary hearing, when he was able to see Beaudreaux and "the way he walked," and things "basically clicked." *Id.* at 714-715.

Crowder—who had pleaded guilty to voluntary manslaughter and agreed to testify truthfully in exchange for a probationary sentence—also testified at Beaudreaux's trial. App. 78a. He recounted that he had met Beaudreaux at the bar and had smoked marijuana with him. *Id.* He further testified that, when he and Drummond were arguing outside, he had seen Beaudreaux break through the crowd, pull a gun from his waistband, point the gun at Drummond's neck, and demand his money. *Id.* at 79a. Crowder stated that he had seen Drummond reach for the gun

barrel and struggle with Beaudreaux, had heard a shot, and had seen Drummond run away. *Id.* Massey testified that he previously had identified Beaudreaux's photo as showing characteristics similar to the shooter. RT 389-391.

The prosecution also played for the jury a tape recording of a conversation that occurred between Beaudreaux and Crowder while they were being transported to court in a police van. App. 77a-78a. Beaudreaux was recorded telling Crowder: "'You think it's hard now? Shit's about to get real out here . . . Respect my gangster. . . . No turning back.'" "'You better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again.'" "'Man, fuck this . . . timing man. If you would have kept your mouth shut, we wouldn't be in this shit. You just don't know where everything is.'" *Id.*

The jury found Beaudreaux guilty, and the court sentenced him to prison for a term of 50 years to life. App. 10a-11a, 72a-73a.

b. The California Court of Appeal affirmed the judgment on direct review in 2011. App. 72a-97a. It also summarily denied Beaudreaux's first state habeas petition, which alleged that defense counsel had been incapacitated and had rendered ineffective assistance at trial. *Id.* at 97a-98a. The California Supreme Court denied review in both the appeal and the habeas matter. *Id.* at 99a-100a.

In 2013, Beaudreaux filed a second state habeas petition, claiming among other things that his trial counsel had been ineffective by failing to move or object to Esho's identification testimony as the product of impermissible suggestiveness in the photo displays. *See* App. 11a, 62a-66a. The state court of ap-

peal summarily denied the petition, on the merits but without stating reasons. App. 101a.[2] The California Supreme Court again denied review. *Id.* at 102a.

3. a. Beaudreaux next filed a federal habeas petition raising various claims, including the claim that trial counsel had been ineffective in failing to challenge Esho's identification testimony. App. 62a-66a. Beaudreaux argued that the photo lineups had been unduly suggestive because each included a photo of Beaudreaux. *Id.* at 65a. The district court denied relief. *Id.* at 65a-66a. It reasoned that, even if assumed that trial counsel performed deficiently in failing to move to suppress the lineups, Beaudreaux could not establish prejudice, because Esho's in-court identifications were sufficiently reliable notwithstanding any alleged suggestiveness in the photo lineups. *Id.* The court granted a certificate of appealability on the ineffective-assistance claim and on a conflict-of-interest claim. *Id.* at 70a-71a.

b. A divided panel of the court of appeals reversed. App. 1a-7a. In a discussion consuming almost six of the opinion's seven pages (*id.* at 1a-6a), the court set out its evalution of the merits of Beaudreaux's underlying claim that his trial counsel, in failing to object to Esho's identification testimony, rendered ineffective assistance under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.*

The court first concluded, under the "performance" prong of the test, that "reasonably proficient" counsel would have objected to the evidence. App.

---

[2] *See Harrington v. Richter*, 562 U.S. 86, 102 (2011); *Stancle v. Clay*, 692 F.3d 948, 957 (9th Cir. 2012); *In re Reno*, 55 Cal. 4th 428, 447 (2012).

2a-3a. It cited counsel's post-trial statement that he did not recall considering such a motion, the lack of a countervailing risk in raising an objection, and the absence of any advantage in forgoing a motion. *Id.* It also discerned a "significant" chance that an objection would have succeeded, reasoning in part that the pretrial identification procedures had been "unduly suggestive." *Id.* at 4a-5a. It cited the facts that more than seventeen months had elapsed before Esho viewed the photo lineups; that both lineups, unusually, had included photos of the same suspect; that Esho had not been positive about his photo identification of Beaudreaux; and that Esho had identified Beaudreaux at trial only after seeing him at the preliminary hearing, "itself a suggestive situation." *Id.*

The court further concluded that the circumstances weighed against any finding that Esho's in-court identification might nonetheless have been reliable and admissible. App. 6a. It acknowledged that Esho had a good opportunity to view the gunman and had paid close attention to him. *Id.* But it cited, as contrary factors, the length of time between the shooting and the photo lineups, Esho's initial description of the gunman as taller and with a darker complexion than Beaudreaux, the "considerable" uncertainty of Esho's initial identifications, and his "repeated exposure to Beaudreaux's photograph" prior to seeing Beaudreaux at the "suggestive" preliminary examination. *Id.* at 6a.

Next, the court concluded that counsel's performance was "prejudicial" under the second prong of the *Strickland* test. App. 6a-7a. It declared that Esho's identification testimony had been "essential" and that the state's case otherwise had been "weak." *Id.* Recognizing that Crowder had also identified Beaudreaux at trial, the court suggested that

"Crowder was likely not regarded as a credible witness." *Id.* It discounted Beaudreaux's tape-recorded statements as possibly signifying only that he was angry at being falsely identified. *Id.* Based on its assessment of the evidence and of the likelihood that a motion to suppress all of Esho's identification testimony would have been granted, the court concluded there was a reasonable probability the jury would ultimately have reached a different result if counsel had made such a motion. *Id.*

In the last three paragraphs of its opinion, the court of appeals acknowledged that the state court's contrary judgment, rejecting Beaudreaux's ineffectiveness claim, was entitled to "doubly deferential" review under 28 U.S.C. § 2254(d) and *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). App. 6a-7a. In one sentence, the court held that the state court's application of *Strickland*'s performance prong "was not reasonable." *Id.* It pointed only to its own previously stated view regarding the merits of such a motion, the lack of any apparent tactical advantage in forgoing one, and the fact that counsel recalled no strategic motive for not filing one. *Id.* In another brief paragraph, the court concluded that the state court could not reasonably have relied on the prejudice prong of *Strickland*. *Id.* at 7a. After restating the *Strickland* standard, the federal court simply declared, based on its own previous merits analysis, that "[t]he only reasonable conclusion, given the weakness of the state's case and the critical importance of Esho's identification, is that a more favorable verdict was 'reasonably likely' absent the ineffective representation" by trial counsel. *Id.*

Judge Gould dissented. App. 8a. He reasoned that "corroborated accomplice testimony and recorded statements made by Beaudreaux" provided suffi-

cient grounds for a state court to conclude that any ineffectiveness relating to eyewitness Esho did not lead to prejudice under *Strickland*. *Id.* Citing *Harrington v. Richter*, 562 U.S. 86 (2011), Judge Gould concluded that the state conviction could not properly be set aside under AEDPA because "it cannot be said that the state appellate court decision to not give relief to Beaudreaux was an objectively unreasonable application of Supreme Court precedent." *Id.*

The court of appeals denied the State's petition for rehearing and rehearing en banc. App. 9a.

REASONS FOR GRANTING THE PETITION

The decision below sets aside a state murder conviction based on the Ninth Circuit's de novo review of a claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 66 (1984). In doing so, the decision "all but ignore[s] 'the only question that matters'" in federal review of a state conviction: whether the state court's contrary judgment is so objectively unreasonable as to overcome the stringent limitations on federal habeas relief imposed by Congress in 28 U.S.C. § 2254(d). *See Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Indeed, the Ninth Circuit in its decision below failed, as it did in *Richter*, to meet its basic § 2254(d) obligation. There, the Ninth Circuit "explicitly conducted a *de novo* review, and after finding a *Strickland* violation, it declared, without further explanation, that the 'state court's decision to the contrary constituted an unreasonable application of *Strickland*.'" *Richter*, 562 U.S. at 101-102. "Because the Court of Appeals had little doubt that [the] *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it." *Id.* at 102.

"AEDPA demands more." *Richter*, 562 U.S. at 102. A federal habeas court reviewing an unexplained merits adjudication by a state court "must determine what arguments or theories . . . could have supported[] the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 101. But the Ninth Circuit in this case failed to address or refute clearly available arguments that fair-minded jurists could conclude support the California Court of Appeal's rejection of Beaudreaux's claim.

As in other such instances, the Ninth Circuit's failure to observe § 2254(d)'s most basic limitation on federal habeas review is clear on the face of the record in this case, and the Court may wish to consider summary reversal. *See, e.g.*, *Felkner v. Jackson*, 562 U.S. 594 (2011) (per curiam); *Cavazos v. Smith*, 565 U.S. 1 (2011) (per curiam); *McDaniel v. Brown*, 558 U.S. 120 (2010) (per curiam); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam).

1. In federal habeas review of an ineffective-assistance claim under § 2254(d), "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. . . . A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Richter*, 562 U.S. at 101. Where the state court has rejected the claim on the merits in an unexplained decision—as the California Court of Appeal did here—deferential review under AEDPA requires the federal court to consider all arguments and theories that could sup-

port that state-court judgment, and then determine whether every fair-minded jurist would have to agree that every one of those theories and arguments must be rejected as inconsistent with the holding in a prior decision of this Court. *Id.* at 101.

The majority decision below does not do that. Instead, it first explains at length the majority's own conclusion that trial counsel's failure to move to suppress the Esho identification evidence was deficient under the *Strickland* test. App. 2a-5a. Then, without citing or discussing anything further, it relies on the same analysis to condemn any contrary conclusion by the state court as objectively unreasonable. *Id.* at 6a-7a. In similar detailed de novo review, the decision reaches its own conclusion that counsel's failure to move to suppress resulted in prejudice under *Strickland*. *Id.* at 5a-6a. And then, acknowledging only Beaudreaux's recorded statements to Crowder as a remaining basis for conviction, the decision condemns the state court's judgment as unreasonable by citing, again, only its own assessment of the weight of the evidence. *Id.* at 7a.

2. There are many theories and arguments—presented to but ignored by the court below—upon which fair-minded jurists might agree with the California court's decision to deny relief on Beaudreaux's claim.

First, they could reasonably conclude that a competent lawyer might have chosen not to object to the Esho testimony because the objection was not likely to succeed.[3] The merit of a potential objection is an

---

[3] On this point, fair-minded jurists might discount the reliance in the decision below on "the lack of any apparent tactical advantage in declining to raise the issue." Pet. App. 6a-7a; *see id.* at 2a-3a. As this Court explained in reversing the court below

(continued...)

essential component of a valid claim of ineffectiveness for failure to object. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). As this Court has explained, due process requires suppression of eyewitness identification evidence only if the pretrial identification procedure (1) was arranged by law enforcement, (2) was "both suggestive and unnecessary," and (3) was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Perry v. New Hampshire*, 565 U.S. 228, 238 (2012); *Simmons v. United States*, 390 U.S. 377, 384 (1968). Here, even the majority below, which had all the evidence in front of it, stopped well short of any ruling that an objection to the Esho testimony would actually have succeeded as a matter of federal constitutional law. *See* App. 3a ("significant chance of success on the merits"). If it is not even clear that an objection to the identification testimony would have succeeded, it can hardly be clear that the state court's rejection of an ineffectiveness claim based on failure to object was objectively unreasonable.[4]

(...continued)
in a previous AEDPA case, defense counsel is not required to pursue every claim or defense just because there is "nothing to lose." *Knowles v. Mirzayance*, 556 U.S. 111, 121-122 (2009).

[4] The Ninth Circuit's reliance on the "significant chance of success" standard as demonstrating deficient performance also undercuts *Strickland*'s prejudice standard. A defendant alleging that counsel should have filed a motion to suppress must prove that the underlying claim "is meritorious." *Morrison*, 477 U.S. at 375. Finding counsel deficient in failing to make a suppression motion based on nothing more than a "significant chance of success," and then evaluating prejudice based on the assumption of a motion having been granted, improperly bypasses *Strickland*'s "reasonable probability" standard for prejudice. Notably, in *Strickland*, the Court declined the dissent's invitation to use the less rigorous "significant chance of success"
(continued...)

Indeed, there is no sound basis for concluding that either photo identification procedure with Esho was marred by police practices that were either unnecessary or suggestive—let alone so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See Perry*, 565 U.S. at 238. Esho was shown two different photo lineups, each including a (significantly different) photo of Beaudreaux, App. 103a-104a; but there is no constitutional prohibition against the police conducting more than one identification procedure in a given case. There is no suggestion that the police's methods in any other way conveyed to Esho a belief that Beaudreaux was the culprit. Beaudreaux has never claimed that physical differences between the men in the photo arrays would have drawn undue attention to Beaudreaux's picture. A fair-minded jurist could conclude that the photo displays were not unduly suggestive at all, and certainly not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

It is true, as the majority observed, that "[t]he officer who presented the photographic arrays to Esho testified that it was not common practice to show the same individual in successive arrays." App. 4a. However, Detective Sabins explained why he showed Esho a second lineup: "[T]he photograph in the first lineup was a very current photograph of Nicholas Beaudreaux. I was able to find an older picture that

---

(...continued)
standard for the prejudice prong. *See Strickland*, 466 U.S. at 716-717 (Marshall, J., dissenting) (criticizing the rejection of a "significant chance" standard for prejudice in favor of the "reasonable probability" standard, citing his dissent in *United States v. Agurs*, 427 U.S. 97, 121-122 (1976)).

was closer to—a picture of Nicholas Beaudreaux that was closer to the date of these events." RT 624. In failing to address that testimony, the panel completely ignored a perfectly plausible reason for the state court to deny relief: Due process did not require the police to stop investigating a tentative identification of Beaudreaux based on a very recent photo when a different photo, nearer in time to the shooting, was also available.

A state court jurist also could reasonably disagree with the assertion in the decision below that the circumstances of Esho's in-person identification of Beaudreaux at the preliminary hearing were "undoubtedly suggestive." App. 4a, 5a. The decision relies on *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995), which is neither apposite nor capable of "clearly establishing" any rule binding on state courts for purposes of review under AEDPA. *See Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (per curiam) (only Supreme Court holdings count as clearly established law under § 2254(d)). Indeed, *Johnson* ruled admissible the identification of the defendant at trial by a witness who had not identified him in a photo lineup but who had succeeded in identifying him at a suppression hearing, despite the assertedly suggestive atmosphere of the suppression hearing. *Id.* at 929. That is like what happened here, except that in this case, prior to the preliminary hearing, Esho had already given a tentative identification of Beaudreaux in the photo lineups.

Finally, even if there had been unconstitutional suggestiveness in the photo displays, a fair-minded state court judge reasonably could have determined that Esho's testimony identifying Beaudreaux at the preliminary hearing and at trial remained reliable and admissible. *See Manson v. Brathwaite*, 432 U.S.

98, 114 (1977) ("reliability is the linchpin in determining the admissibility of identification testimony"); *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) ("the central question [is] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive"). Esho paid attention during the altercation. App. 66a. He actually spoke with Beaudreaux immediately after the shooting. *Id.* And he demonstrated a high degree of certainty when he positively identified Beaudreaux after seeing him in person at the preliminary hearing and at trial. *Id.* He expressly testified at trial that he became sure at the preliminary hearing that Beaudreaux was the shooter because of Beaudreaux's appearance and "the way he walked." *Id.* at 64a.

In evaluating all these arguments and theories on state habeas review, the state court was not bound to come to the same conclusions that a divided panel of the Ninth Circuit would eventually reach, reviewing the case years later. *See, e.g., Richter*, 562 U.S. at 101; *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (per curiam) ("The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable."). The California Court of Appeal reasonably could have concluded, in rejecting Beaudreaux's ineffective-assistance claim, that there was no impermissible suggestiveness in the identification procedures, that the ultimate identification was in any event reliable, that a challenge to the identification testimony would have failed, and that the failure to lodge such an objection therefore was not ineffective.

3. Moreover, even if competent counsel would have lodged an objection, and even if such an objec-

tion would have been meritorious, the state court still could reasonably have concluded that there was no prejudice under *Strickland* because there was no "reasonable probability" that, but for the failure to seek suppression, Beaudreaux would have been acquitted. *See Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

The state court could reasonably have concluded that, even setting aside evidence of Esho's identifications, the evidence against Beaudreaux was strong. Beaudreaux's long-time acquaintance, Crowder, testified that Beaudreaux shot Drummond. App. 78a-79a. Crowder told the police immediately after the shooting that he knew the gunman from middle school; and seventeen months later he identified Beaudreaux from a middle school yearbook. *Id.* at 77a. Crowder also testified that, when he ran into Beaudreaux several months after the shooting, Beaudreaux had told him, "you owe me one." RT 514. Crowder, of course, was demonstrably and inextricably linked to the crime. There was no dispute that Crowder had witnessed the shooting and knew the shooter, but that he was not himself the shooter. The victim's friends knew Crowder personally, and identified him as a participant in the altercation but not as the shooter. App. 77a.

The decision below speculates that the jury "likely" did not regard Crowder as credible. App. 5a-6a. The jury was aware that Crowder had lied to police, cooperated only after he had been arrested and charged with a separate crime, and was testifying pursuant to a plea agreement. App. 78a-79a. But, as Judge Gould noted in dissent, Crowder's testimony

was corroborated by other evidence that the state court reasonably could deem significant. App. 8a.

The jury also heard evidence of Beaudreaux's consciousness of guilt in the form of his recorded comments to Crowder in the transport van. App. 77a-78a. The decision below again speculates that those comments might have been explained away as showing only the outrage of a man falsely accused. App. 6a. But the state court could reasonably have construed the comments instead as strong evidence that Beaudreaux had committed the murder and was "livid" (*id.*) at Crowder for having betrayed him to the police. Indeed, that is by far the more plausible construction. But even if the question were close, on points such as these AEDPA requires that the state court decision must be given the benefit of the doubt. *Visciotti*, 537 U.S. at 24; *Richter*, 562 U.S. at 101.

In addition, although Shandon Massey testified at trial that he was "not absolutely sure" Beaudreaux was the gunman, App. 78a, he also acknowledged that during the investigation he had said a photo of Beaudreaux showed a man with "similar characteristics" to the shooter, RT 389-391, 627-629. The decision below never mentions Massey's testimony. And, finally, even a successful motion to suppress Esho's ultimate identifications based on supposedly suggestive repetitive confrontations would have afforded no basis to exclude the tentative identification Esho made in the *first* photo line-up. There, Esho said Beaudreaux's photo was the "closest to the person who shot Wayne." RT 621-623.

On the record in this case, the state court of appeal could reasonably have determined that Beaudreaux suffered no *Strickland* prejudice. Likewise, as discussed above, the state court could reasonably have concluded that there was no need to

assess potential prejudice at all, because there was no showing that failing to seek suppression of Esho's identifications of Beaudreaux amounted to deficient performance in the first place. The Ninth Circuit in the proceedings below was authorized to set aside Beaudreaux's state murder conviction only if it could explain, not why it would have reached a different conclusion as to either performance or prejudice in the first instance, but why the state court's contrary judgment was "objectively unreasonable." *Visciotti*, 537 U.S. at 27.

The decision below is devoid of any such explanation. Here once again, therefore, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." *Richter*, 562 U.S. at 101. And here once again the State must ask this Court to enforce the clear limitations that Congress and the Court have placed on federal habeas review in order "to ensure that state [criminal] proceedings are the central process, not just a preliminary step for a later federal habeas proceeding[.]" *Id.* at 103.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
BRUCE ORTEGA
Deputy Attorney General

February 6, 2018

APPENDIX

Case: 15-15345, 09/18/2017, ID: 10584085,
DktEntry: 51-1, Page 1 of 9

FILED SEP 18 2017
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHOLAS BEAUDREAUX, Petitioner-Appellant,	No. 15-15345
v.	D.C. No. 5:13-cv-00351-BLF
J. SOTO, Warden, Respondent-Appellee./	MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted February 16, 2017
San Francisco, California

Before: GOULD and BERZON, Circuit Judges, and GARBIS,** District Judge.

Nicholas Beaudreaux appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He contends that (1) his trial counsel provided him with ineffective assistance of counsel ("IAC") at his trial on a first-degree murder charge by failing to object to, or move to

---

* This disposition is not appropriate for publication and is not precedent except as proved by Ninth Circuit Rule 36-3.

** The Honorable Marvin J. Garbis, United States District Judge for the District of Maryland, sitting by designation

exclude, the testimony of one eyewitness as the product of impermissibly suggestive photographic identification procedures; and (2) trial counsel's deficient performance prejudiced Beaudreaux's defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

1. The relevant inquiry with respect to the first *Strickland* prong is whether a reasonably competent attorney would have made a motion to exclude or raised an objection regarding witness Dayo Esho's identification of Beaudreaux. *Id.* at 687–88. Given the importance of Esho's testimony, the significant chance of succeeding on a suppression motion, and the absence of any plausible strategic reason for not filing such a motion, a reasonably proficient attorney would have filed it.

A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks and citation omitted). Applying that presumption, we can find no basis for concluding that trial counsel David Kelvin's failure to object to, or to move to exclude, Esho's identification testimony was, or could have been, the product of sound strategic consideration.

First, Kelvin submitted a declaration stating that he did not remember considering filing a motion to exclude Esho's identification testimony, and that his failure to do so "denied Mr. Beaudreaux the effective assistance of counsel." A state court is not necessarily bound to accept trial counsel's testimony regarding whether a particular action at trial was "tactical" or simply a mistake. *Edwards v.*

Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). *Edwards*, however, is inapposite. In *Edwards*, the relevant IAC claim concerned trial counsel's decision to allow a defendant to testify regarding conversations with his wife (thereby waiving the marital communications privilege and permitting the defendant's wife to give inculpatory testimony). *Id.* at 1123–24. In such a case, an objectively reasonable attorney might well have concluded that the potential benefit of his client's testimony regarding any privileged conversations would outweigh any detriment from his wife's testimony about the same communications. No such tactical benefit could inure here, where prevailing on a motion to suppress would have eliminated an identification of central importance to the prosecution's case, without any countervailing procedural or substantive risk to Beaudreaux. *Cf. Premo v. Moore*, 562 U.S. 115, 126–27 (2011); *Strickland*, 466 U.S. at 673. Trial counsel's indication that there was no tactical reason for his failure to challenge Esho's identification is therefore quite plausible, and so merited some weight.

Second, although "it is not professionally unreasonable to decide not to file a motion . . . clearly lacking in merit," *Tomlin v. Myers*, 30 F.3d 1235, 1238 (9th Cir. 1994) (quoting *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991)), a motion to exclude Esho's in-court identification as the product of impermissibly suggestive pretrial identification procedures would have had a significant chance of success on the merits.

More than seventeen months expired between the shooting of Wayne Drummond and the police's interview of Esho. Police showed Esho two successive "six-pack" photographic lineups containing

six photographs of African-American men. Both lineups included photographs of Beaudreaux; no other individual appeared in both lineups. The officer who presented the photographic arrays to Esho testified that it was not common practice to show the same individual in successive arrays.

Esho did not make a positive identification from either photographic array. He first stated that Beaudreaux's photo was "closest" to the gunman, but that the photograph showed a man whose "face [was] a little wider and his head a little higher." Esho testified that at that point, he was "pretty sure" that the man in the photograph was *not* Drummond's killer. After seeing a second photographic array which *also* included Beaudreaux, Esho wrote that the photograph of Beaudreaux was "very close." Esho testified at trial that he may have unconsciously relied on the first photographic lineup when viewing the second one. The suggestiveness of identification procedures—and the danger of misidentification—increases when, as here, "the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." *Simmons v. United States*, 390 U.S. 377, 383 (1968); *see also Foster v. California*, 394 U.S. 440, 442–43 (1969).

After the two photographic lineups, Esho still did not positively identify Beaudreaux. He did so only after seeing Beaudreaux at a preliminary hearing. Courtroom procedures such as the defendant's preliminary hearing are "undoubtedly suggestive" as to the defendant's identity as the perpetrator. *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995); *see also Foster*, 394 U.S. at 443. The pretrial identifications were therefore based on unduly suggestive procedures.

Even if a pretrial identification procedure is unduly suggestive, an in-court identification may still be admissible. *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainly demonstrated by the witnesses at the confrontation, and the length of time between the crime and the confrontation." *Id.* These factors would have supported a finding that Esho's in-court identification was not reliable.

Esho had a good opportunity to view the gunman at the time of the crime and paid close attention to the gunman. But the other three factors weigh against the state. Seventeen months elapsed between the shooting and the photographic lineups. Esho's initial description of the gunman portrayed a man several inches taller than Beaudreaux with a significantly darker complexion. And Esho's initial identifications evinced considerable uncertainty; only after repeated exposure to Beaudreaux's photograph did Esho positively identify him at the preliminary hearing, itself a suggestive situation.

2. Given the weakness of the state's case, there is a "reasonable probability" that a jury would have reached a different result had the motion been filed. *See Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Esho's identification testimony was essential to the state's case. Without Esho's identification, the strongest evidence against Beaudreaux was the eyewitness testimony of Brandon Crowder, which included identification of Beaudreaux. But Crowder

was likely not regarded as a credible witness. He initially lied to police over the course of several interrogations regarding the crime at issue, and cooperated only after he had been arrested and charged with a separate crime. And Crowder was himself was himself charged with Drummond's murder; he testified against Beaudreaux pursuant to a plea agreement in which he pled no contest to the lesser offense of voluntary manslaughter and received a sentence of probation, with no prison term. In contrast to Crowder, a known liar and criminal offender with a strong incentive to identify Beaudreaux as the killer, Esho had not criminal record, and his testimony was not induced by any deal with the government.

The third piece of evidence on which the state relied at trial—the recording of a conversation between Beaudreaux and Crowder in a police van transporting the two suspects to prison—was not enough to dissipate the prejudice related to Esho's identification. The recording is certainly persuasive evidence that Beaudreaux was extremely angry at Crowder for fingering him as a murderer. But there was no statement in the recording revealing whether Beaudreaux was livid because he had committed the murder or because he had not and was being falsely identified. If the jury was not convinced by Crowder's testimony identifying Beaudreaux, there is a reasonable probability that it would not have regarded the recorded conversation as sufficient to conclude beyond a reasonable doubt that Beaudreaux was the murderer.

3. The state has the benefit of "doubly deferential" review on *Strickland* claims subject to AEDPA. *Cullen v. Pinholster*, 563 U.S. 170, 190

(2011); *see* 28 U.S.C. § 2254(d)(1). But Beaudreaux meets his high burden here.

In light of the merits of the motion to suppress, the importance of the evidence subject to suppression, the lack of any apparent tactical advantage in declining to raise the issue, and Kelvin's declaration that he recalled no strategic motives, a conclusion by the state court that Kelvin's representation was not deficient was not reasonable. *Cf. Kimmelmlan v. Morrison*, 477 U.S. 365, 385–86 (1986).

On the second prong of *Strickland*, Beaudreaux's conversation with Crowder offered the jury some basis for convicting Beaudreaux in the absence of Esho's identification. But the question on the second prong of *Strickland* is not whether a jury *could* have convicted Beaudreaux absent the ineffectiveness of his counsel, but whether there is a reasonable probability that it would have. *See Vega v. Ryan*, 757 F.3d 960, 969–70, 974 (9th Cir. 2014). The only reasonable conclusion given the weakness of the state's case and the critical importance of Esho's identification, is that a more favorable verdict was "reasonably likely" absent the ineffective representation. *Strickland*, 466 U.S. at 696; *see* 28 U.S.C. § 2254(d)(1).

We conclude that the stringent requirements of AEDPA are met here. We therefore **REVERSE** and **REMAND** to the district court with instructions to grant the writ of habeas corpus.

Case: 15-15345, 09/18/2017, ID: 10584085,
DktEntry: 51-2, Page 1 of 1

FILED SEP 18 2017
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Beaudreaux v. J. Soto, 15-15345

GOULD, J. Dissenting:

I respectfully dissent. Relying on corroborated accomplice testimony and recorded comments made by Beaudreaux, it would also be reasonable for a state court to conclude that, under *Strickland v. Washington*, 466 U.S. 668 (1984), any ineffective assistance of trial counsel in how eyewitness identification evidence was handled did not prejudice Beaudreaux. Assuming there was an error in the identification procedure, I am not persuaded that it had a substantial and injurious effect on the verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). In short, it cannot be said that the state appellate court decision to not give relief to Beaudreaux was an objectively unreasonable application of Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011). So relief under AEDPA is not warranted.

Case: 15-15345, 11/08/2017, ID: 10647344,
DktEntry: 53, Page 1 of 2

FILED NOV 8 2017
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHOLAS BEAUDREAUX, Petitioner-Appellant,	No. 15-15345
v.	D.C. No. 5:13-cv-00351-BLF
J. SOTO, Warden, Respondent-Appellee./	ORDER

Before: GOULD and BERZON, Circuit Judges, and GARBIS,* District Judge.

Judges Garbis and Berzon have voted to deny the petition for panel rehearing. Judge Gould has voted to grant the petition for panel rehearing.

Judge Berzon has voted to deny the petition for rehearing en banc, and Judge Garbis so recommends. Judge Gould has voted to grant the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

*The Honorable Marvin J. Garbis, United States District Judge for the District of Maryland, sitting by designation.

FILED FEB -5 2015
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

NICHOLAS BEAUDREAUX,
Petitioner,

v.

J. SOTO, Warden
Respondent./

No. C 13-00351 BLF (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; GRANTING CERTIFICATE OF APPEALABILITY AS TO CLAIM SEVEN AND CLAIM EIGHT

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court ordered Respondent to show cause why the petition should not be granted. Respondent has filed an answer addressing the merits of the petition. Petitioner has filed a traverse. Having reviewed the briefs and the underlying record, the Court concludes that Petitioner is not entitled to relief based on the claims presented and denies the petition.

PROCEDURAL HISTORY

Petitioner was found guilty by a jury in Alameda County Superior Court of first degree murder and attempted second degree robbery. The jury also found true the enhancement allegations that Petitioner personally used a firearm and personally

and intentionally discharged it during the commission of the murder and attempted robbery. Lastly, the jury found true that Petitioner personally and intentionally discharged a firearm, inflicting great bodily injury on the victim and causing his death in connection with the murder. Petitioner was sentenced to 50 years to life in state prison. (Ans. Ex. A at 360-64, 416-22; Ex. B at 906-08, 917-18.)

Petitioner filed a direct appeal to the California Court of Appeal and a petition for writ of habeas corpus. On July 21, 2011, the state appellate court affirmed the judgment and summarily denied the petition. (Ans. Exs. I & J.)

The California Supreme Court denied Petitioner's request for a review of his direct appeal and the state habeas petition. The state high court summarily denied both petitions on October 11, 2011. (Ans. Exs. M & N.)

On December 29, 2012, Petitioner filed another petition for writ of habeas corpus in the California Court of Appeal, which summarily denied the petition on January 10, 2013. (Ans. Ex. P.)

On January 23, 2013, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which summarily denied the petition on March 27, 2013. (Ans. Ex. S.)

Petitioner filed the instant federal habeas petition on January 25, 2013, which was stayed pending Petitioner's litigation and exhaustion of the issues in his then pending state habeas petition. (Docket No. 6.) On July 16, 2013, the Court lifted the stay and ordered Respondent to show cause why Petitioner was not entitled to relief. (Docket No. 8.)

BACKGROUND[1]

On the evening of September 3, 2006, Aluma Raymond Nkele went out for drinks with his friends, Wayne Drummond, Dayo Esho and Shandon Massey at Kip's on Durant Avenue in Berkeley. [FN2] After drinking a couple of pitchers of beer, the group left and walked up to Telegraph Avenue. They saw a large crowd in front of Blakes, a bar on Telegraph, and proceeded to walk in that direction. Nkele ran into his friend, Marquel, on the corner of Durant and Telegraph and stopped to talk with him.

> FN2. Nkele and Esho were 2005 graduates from the University of California, Berkeley (UCB); Massey graduated from UCB in 2004. Drummond attended community college.

Esho saw Crowder and greeted him, but Crowder did not reciprocate and instead tapped [Petitioner] who was with him and said, "That's him. That's him," pointing. Drummond was in the group behind Esho. Crowder and Drummond then started to argue angrily. Nkele and Massey also heard the argument ensuing between Drummond and Brandon Crowder, who was also one of Nkele's friends. [FN3] Nkele could hear that Drummond was upset but he could not hear what Drummond and Crowder were arguing about. Massey testified that he heard Drummond and Crowder agree to settle their argument around the corner.

> FN3. Nkele found Crowder to be a bit immature so Nkele was a "big brother" to

---

[1] The facts of this case are taken from the California Court of Appeal opinion in *People v Beaudreaux*, No. A126140 (Cal. App 1 Dist. July 22, 2011). (Pet. Ex. I ("Op").)

him and tried to mentor him by having him associate with his friends.

Esho tried to break up the fight. But Drummond and Crowder continued to argue and walked around the corner up Durant Avenue. Esho followed them and [Petitioner] was behind him. Massey was following the group behind Esho. Esho heard [Petitioner] say, "I don't know how to fight, but I know how to use this metal." Esho continued to try to physically break up Drummond and Crowder. A crowd of people followed them.

Drummond and Crowder eventually stopped and faced each other on Durant Avenue and continued arguing. At some point, Drummond pointed to Crowder and said, "I'll fuck you up, I'll fuck you up." He also said the same thing to [Petitioner] and a third unidentified male that was with them. Massey testified that he heard Drummond say, "I'll fuck you up" and "I don't care. I'll fight anybody." Crowder then said, "Yo, somebody handle this," and moved to the left. [Petitioner] then walked up to Drummond, pointed a gun at his neck, and aggressively said, "You need to give me your wallet right now." Massey told police that he heard the gunman say, "Give me your wallet or break yourself." Drummond grabbed the barrel of the gun and tried to wrestle it away from [Petitioner]. As Drummond pushed the gun away to his right and started to run, [Petitioner] pulled the trigger. Drummond ran up Durant. Esho heard a gunshot. He testified that the gun had been pointed at the area between Drummond's hip and stomach. [Petitioner] followed Drummond up Durant but stopped when Esho approached him. Esho told him to "leave us alone." [Petitioner] said, "He tried to grab my pistol." [Petitioner] turned and walked back down

Durant towards Telegraph while Esho went to find Drummond.

Esho found Drummond on Bowditch, just a few feet from Durant. He was rolling around on the ground. Esho tried to see if he had been shot. He checked his shirt where he thought Drummond had been shot but saw no blood or any signs of a bullet wound. A young man was near Drummond and told Esho that he had seen him fall pretty hard and did not think he had been shot. The man was not part of Esho's group of friends. Esho tried to talk with Drummond, but he was moaning and looked like someone who had had too much to drink.

Nkele also heard the gunshot and followed the crowd at a brisk pace and heard a pop. He did not see a gun or the shooter. The crowd dispersed. Nkele ran up Durant Avenue in search of Drummond. Massey also followed Drummond and found his wallet on the sidewalk near the area of the gunshot and picked it up. When he got to Bowditch, he saw Drummond on the ground. Esho and Massey, and another man were also there.

Nkele checked on Drummond and thought he was very drunk. His speech was slurred and he did not look good. Nkele spoke with Esho and knew someone had brandished a gun. Nkele and Massey checked Drummond for injuries, but did not see anything. Drummond was wearing a white shirt and there was no blood on it.

Nkele then went to meet Crowder who was around the corner on Durant and got into Crowder's car. They had a brief conversation. Crowder apologized and told Nkele, "I'm sorry it happened like that. But, you know, you mess with me, that's what you get." Nkele told Crowder to stay away from Drummond: "Wayne doesn't exist to you from

now on. Okay. You see each other, no eye contact. Don't say anything at all. Just keep walking." Nkele had no idea that Drummond had been shot. He got out of the car and Crowder drove away.

Nkele returned to Drummond and found him in the same condition. Drummond asked for water. He was not able to stand, and was slurring his words. Esho left to get water. He drove to the Chevron station at Telegraph and Ashby and bought two bottles of water. There, he saw Crowder's van drive away from the station. A surveillance tape from Chevron showed Esho's car and Crowder's van at the station and Esho at the window of the minimart there. Esho left the Chevron station at 1:54 a.m.

Esho returned to Drummond and tried to give him the water, but Drummond was not able to drink it. Officer Elgin McIntosh, who was on routine patrol, noticed a man on the ground and stopped to determine whether he needed medical assistance at approximately 2:00 a.m. Drummond appeared to be intoxicated; he was somewhat responsive, he had vomited, and his speech was slurred. McIntosh did not observe any injuries or blood on Drummond. Although McIntosh asked Esho and the others present what had happened, no one mentioned the shooting. Nkele testified that "at that point, I'm thinking . . . honestly and truthfully . . . we're going to sleep this off. I'm going to take him to a bed, we're going to sleep this off and deal with all this in the morning." Massey did not want to deal with the police, and Drummond had said he wanted to go home. Esho, Nkele, and Massey placed Drummond in Esho's car and took him to a sorority on 2311 Prospect Street, where Nkele was staying. Once he was in Nkele's room, Esho noticed that

Drummond was bleeding from the nose and was nonresponsive. Esho called 911.

Emergency personnel responded to Esho's call but were unable to save Drummond. Drummond died from a gunshot wound to the right hip, penetrating his pelvis, fracturing his pelvic bone, and hitting a major blood vessel. He suffered substantial internal bleeding and went into shock. He had gunshot residue on his hands. It is impossible to determine whether Drummond would have survived the injury had he received prompt medical attention.

On the afternoon of September 4, 2006, Esho, Massey, and Nkele identified Crowder as the person who had argued with Drummond early that morning.

The police interviewed Crowder in September 2006 and learned that Crowder had gone to school with the person who shot Drummond.

In 2008, the police learned that Crowder was involved in a criminal threats case. Crowder turned himself in to the Berkeley police department on February 13, 2008 on the threats warrant. Crowder waived his *Miranda* [FN4] rights and eventually identified [Petitioner]'s photograph from a middle school yearbook as Drummond's shooter. He then identified [Petitioner] from a photographic lineup.

FN4. *Miranda v. Arizona* (1966) 384 U.S. 436.

On February 19, 2008, the police transported Crowder and [Petitioner] in a van from the Berkeley jail to the North County jail for court. The van had a tape recorder and during the drive [Petitioner] made various comments to Crowder including, "You think it's hard now? Shit's

about to get real out here. . . . Respect my gangster. . . . No turning back." [Petitioner] also told Crowder, "You just better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again." And [petitioner] said, "Man, fuck this . . . timing man. If you would have kept your mouth shut, we wouldn't be in this shit. You just don't know where everything is."

On February 14, 2008, Esho identified [Petitioner] as possibly being the shooter in two photographic lineups. Esho identified [Petitioner] as the shooter at both the preliminary hearing and at trial. Massey was not absolutely sure that [Petitioner] was the shooter.

Crowder was initially a codefendant with [Petitioner] at trial. After the jury was selected, however, Crowder entered into a plea agreement with the prosecution under which he agreed to testify against [Petitioner]. Crowder testified that he entered into a written plea agreement under which he agreed to plead no contest to a charge of voluntary manslaughter, with the understanding that he would testify truthfully in the case and in exchange he would be sentenced to time served.

Crowder testified that he suffered a misdemeanor conviction for possession of stolen property in 2005. In September 2006, he was 19 years old and living in Berkeley. He had known [Petitioner] since middle school. He met Drummond through a friend at a party in 2005. Drummond was friends with Nkele, who was also one of Crowder's friends. Drummond was a mentor to Crowder in 2006, but at some point, they were no longer getting along. Crowder grew annoyed with him. He told others that he wanted to "get" him or "stomp" him.

> On September 3, 2006, Crowder drove to Blakes with some friends and smoked some marijuana. At Blakes, Crowder shared some marijuana with [Petitioner]. At about 1:30 a.m., he left Blakes and saw [Petitioner] hanging around with some people. He shook [Petitioner]'s hand, and [Petitioner] said, "I'll see you next time."
>
> Esho then approached Crowder and greeted him, but Crowder focused on Drummond who was behind Esho. Crowder and Drummond started to talk "trash" to each other. They began to argue and agreed to fight. Crowder testified, "I was fed up with all the name calling, and I was just kind of excited." They walked up Telegraph and then turned right on Durant. Esho, [Petitioner], and others followed them "to see a fight." He could hear [Petitioner] talking but he did not remember what he said. At some point, they stopped walking, faced each other, and continued the name calling. They called each other "bitch" and were pushing each other. Esho was trying to break them up. Drummond pointed to Crowder and said, "I'll fuck you up"; he also pointed to [Petitioner] and said the same thing. Crowder stepped back. [Petitioner] broke through the crowd, pulled out a gun, and pointed it at Drummond's neck. [Petitioner] told Drummond, "You need to give me your money right now." Drummond wrestled with [Petitioner] for the gun and then a shot went off. Drummond jumped back and then ran up Durant. Crowder did not think that Drummond had been shot. After meeting up with Nkele, Crowder drove to the Chevron station to meet with Trevina, a female friend. Crowder positively identified [petitioner] as the shooter.

(Op. at 2-6.)

DISCUSSION

I. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams v. Taylor*, 529 U.S. 362, 384-86 (2000), while the second prong applies to decisions based on factual determination, *Miller-El v. Cockrell*, 531 U.S. 322, 340 (2003).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if the state court correctly identifies the

governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411.

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "Under§ 2254(d)(l)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409. The federal habeas court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In determining whether the state court's decision is contrary to, or involved an unreasonable application of, clearly established federal law, a federal court looks to the decision of the highest state court to address the merits of a Petitioner's claim in a reasoned decision. *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir. 2000). Here, that decision is the opinion of the California Court of Appeal on

direct appeal with respect to the first three claims stated below. (Ans. Ex. I.) The claims of ineffective assistance of counsel were raised in state habeas petitions and summarily denied. See *supra* at 2.

The Supreme Court has vigorously and repeatedly affirmed that under AEDPA, there is a heightened level of deference a federal habeas court must give to state court decisions. *See Hardy v. Cross*, 132 S. Ct. 490, 491 (2011) (per curiam); *Harrington v. Richter*, 131 S. Ct. 770, 783-85 (2011); *Felkner v. Jackson*, 131 S. Ct. 1305 (2011) (per curiam). As the Court explained: "[o]n federal habeas review, AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" *Id.* at 1307 (citation omitted). With these principles in mind regarding the standard and limited scope of review in which this Court may engage in federal habeas proceedings, the Court addresses Petitioner's claims.

II. Petitioner's Claims

Petitioner claims the following as grounds for federal habeas relief: (1) the trial court erred in denying the defense's request for a continuance based on counsel's incapacitating injury, violating Petitioner's right to due process; (2) the trial court erred by refusing to grant a new trial based on ineffective assistance of counsel, violating his Sixth Amendment right; (3) the trial court erred by refusing to grant a new trial based on newly discovered evidence, violating his rights to a jury, to present a defense, and to due process; and (4) ineffective assistance of counsel based on five failures (Claims 4-8).

A. Refusal to Grant a Continuance (Claim 1)

Petitioner's first claim is that the trial court violated his right to due process by failing to grant a continuance based on his trial counsel's back injury, pain and effects of pain medication. (Pet. Attach. at 4.)

The California Court of Appeal reviewed what occurred at trial with respect to this claim:

> On June 15, 2009, during the prosecution's case, the court recessed the trial until June 29, 2009 because it was going to be covering another judge's calendar the following week. On Monday, June 29, 2009, defense counsel informed the court that he had gone to the emergency room at Highland Hospital on Saturday, June 26, 2009 because of intolerable back pain. Dr. Nagdev gave him a prescription for Vicodin and said that his symptoms were consistent with radiculopathy or a compressed nerve. Defense counsel represented that he was told he could return to work in five days. He also told the court he did not feel able to function, he could feel the effects of the Vicodin, and he was in significant pain. Defense counsel said, "the analogy I would use . . . if I were an airplane pilot, I don't think I'd be flying a plane today. But it's obviously the Court's decision whether [to] proceed or not. I'd like to go home, but if I have to sit here and try this case, that's what I'm going to do." The prosecutor indicated that he had offered to help defense counsel with exhibits, recordings, and other matters so that defense counsel could remain seated during questioning and examination and that he anticipated resting the case on Wednesday. Finally, the prosecutor said that it was "the People's position that we go forward, and if at some point during the day it becomes unbearable for Mr. Kelvin, perhaps he can let

us know. In other words, to go forward with what we have now." The court stated, "I don't care what the People's position is, quite frankly. [¶] Here's the issue. Mr. Kelvin, you've indicated you've had this. I have back pain every day. And I think I told the lawyers, every day I do 20 minutes of stretching. It's been since 2003 where I saw an orthopedist, and I continue to do this because it's part of the routine. We all have, as we age, we get these back issues. I was reading a book right now regarding somebody and [his] back. [¶] I do have this emergency [form]—from an emergency doctor at Highland who says, '[r]estrictions, no work requiring repetitive bending.' And I do have Mr. Kelvin saying that he's had this back pain for a while, but he went in on Saturday and he's taking this medication. Just knowing the back, knowing what I go through, and I'm not discounting anything you say regarding this, because it talks about a possible sprain of the back and it tells you it could reappear or it couldn't, when it says about—in this little information you gave me, Mr. Kelvin. [¶] Are you seeing an orthopedist, Mr. Kelvin? [¶] [MR. KELVIN]: I don't know what qualifications Dr. Nagdev has. He [was just] an emergency room doctor. . . . I'm supposed to be arranged for an MRI today, but obviously if I'm here—[¶] [THE COURT]: It sort of seems to me—well, like I said, I've seen an orthopedist, and they didn't do an MRI off the top. They just don't do it, not a specialist in this area. I'm not certain why they haven't referred you to an orthopedist, because it's a back. It's not an emergency room specialist. They don't have the expertise to deal with backs. And like I said, this is something that we have. This is what we just live with. [¶] My inclination was that—and before even Mr. Wellman [deputy district attorney] made his

statement, my inclination is to move forward today, because you're going to have this back pain. There's not too much I can do about it, and I don't think there's much you can do about it. It's a thing that's going to be a whole process for the rest of your life. We would take—my thought is we're going to take breaks a little more frequently than we do, that you can cross-examine from the bench, Mr. Kelvin, if you don't feel you can stand up and do it. [¶] What it's saying here is you shouldn't be bending. Doesn't say you shouldn't be standing. Actually, standing is probably better, but I don't know. I'm not certain what—I can't read into this or what the doctor is saying. That's what my thoughts are. [¶] [MR. KELVIN]: The only other comment I would have, I have a number of materials relating [to] this case in the car, which I didn't carry in the court because it was kind of hard to carry them. But I'll just limp back and get them if I can get them in. [¶] [THE COURT]: No. Mr. Payne will get them for you, from the DA's office. [¶] [MR. KELVIN]: He doesn't know where they are. [¶] [THE COURT]: He'll go with you, and he's going to carry them back for you. [¶] [MR. KELVIN]: Okay. Then I'll have a helper. [¶] [THE COURT]: That's my thought. And we are going to be off—assuming that Mr. Wellman finishes, I would have us off after Wednesday. You wouldn't come in on Thursday. [¶] And I'm not certain what you are going to do with your case, Mr. Kelvin. If you're going to call witnesses, we would start on Monday with the witnesses. And if not, we'll start—we'll also do instructions and prepare for argument." Defense counsel then expressed concern that the prosecution intended to call Crowder that day so he needed to go get the recorded statements. The court then deferred Crowder's examination until after the

prosecution completed several other witnesses. Hence, the court's minutes reflect that trial was in session for approximately four hours, [FN5] with the court taking three recesses during that period. [FN6]

> FN5. In its preliminary instructions to the jury, the court informed it that the court would be in session from 9:00 a.m. to 1:30 p.m. with recesses in between on Mondays through Thursdays and that court was not in session on Fridays.
>
> FN6. The court's minutes show that questioning of witnesses began at 9:20 a.m., a recess was taken at 10:02 a.m., and questioning resumed at 10:30 a.m. Trial was again recessed at 11:36 a.m., and at 11:53 a.m., court and counsel discussed matters outside the presence of the jury. The court recessed again for four minutes and then resumed trial at 11:59 a.m. At 12:25 p.m., the People called and began the examination of Crowder. At 1:19 p.m., the court ordered the jury to return the following morning. The court then discussed a couple of notes from jurors before adjourning at 1:24 p.m.

On June 30, 2009, defense counsel again asked for a continuance. The following colloquy occurred: [MR. KELVIN]: "Yesterday I raised an issue concerning my ability to perform in this case based on health factors. I have to tell you today I feel worse than I did yesterday. It took me half an hour to walk from my car to here, which is a block and a half away. I don't feel that Mr. Beaudreaux has an attorney in the meaningful sense of the word. My back hurts real bad and I should be either getting my MRI in line now. And having said that, I know the Court's position. But yesterday I was working all day and I don't know. I'm just a layperson, but to me it exacerbated the

situation. I'm in bad pain and I was unable to concentrate on what Mr. Crowder was saying yesterday. He's the most critical witness in the case. I don't know what anybody is supposed to do about it. I know Mr. Wellman wants to finish the trial. [¶] [THE COURT]: Finishing the trial has nothing to do with it. Mr. Kelvin, yesterday you went through some of these witnesses who were probably two-minute witnesses, you spent 15 minutes on cross-examination. To the extent you had the inability to perform as a lawyer, I didn't see it. In fact, I was amazed with the amount of time that you spent and the issues that you took up with some of these witnesses. So to that extent, you perform well and beyond anybody I've seen in any courtroom as it relates to cross-examining and dealing with issues with witnesses. [¶] Yesterday after everybody left you were here for another 15 minutes. You were walking around, you were doing something with the video. I understand if, yes, you may have some back pain. I had back pain this morning, as I say every day. I have sciatica. I feel the numbness in my legs. I'm here. [¶] You have done, in terms of performing as counsel, I'm just not certain what the real issues are. To the contrary, your performance is totally contrary to the state of condition that you indicated that you were in yesterday. [¶] [MR. KELVIN]: Well, Judge. [¶] [THE COURT]: And I did take several recesses yesterday, including one which was a half an hour long, which is definitely longer than ever that we take a recess in this department. [¶] [MR. KELVIN]: Judge, I'm not going to sit here and not try to do the best I can, but my best at the moment is not much. I just feel that my client's interests are being prejudiced. I did stay yesterday after the jury left because I was trying to get my computer to display

the recorded interview of Mr. Crowder. It works on the computer, but on the screen on the wall there's a signal saying that it's not right. I have an attorney, Mr. Andrew Kapur, who is very technically skilled, and I was going to set it up before we went on the record this morning so my computer will work. Mr. Wellman says, well, his computer is plugged in and he didn't want to unplug his so I can plug mine in. I'm still not in a position to display the interview of Mr. Crowder, which I wanted to do. That's a whole different issue. [¶] If the Court thinks I'm malingering or I'm just trying to make an excuse to delay the thing, that's an assessment the Court has to make. I'm telling you, I'm in pain. I'm not able to do my job. And if the Court is ordering me to proceed, that's what I'm going to do, but I'm just not—I should be lying down. [¶] [THE COURT]: What did you do after you left here yesterday, Mr. Kelvin? [¶] [MR. KELVIN]: I went to one other court and went home about 4:00 o'clock and I laid down until the morning. [¶] [THE COURT]: Why did you go to another court if you were in such a condition? Why didn't you call that court or have my clerk call that court? I don't understand that. [¶] [MR. KELVIN]: Because that court is your Judge Bean's court and I delayed it last week and I promised her I'd be there yesterday. [¶] [THE COURT]: You mean you drove all the way down to Hayward from here yesterday? [¶] [MR. KELVIN]: Yes, I did. I felt like I'd already delayed her case one time and I don't like to be unreliable. In fact, I met in the hallway in Hayward an attorney Mike Wohlstadter, who you know well, and he came up to me unsolicited and said, "Mr. Kelvin, you look terrible. You look like you're in bad pain. Your eyes are sunk in your head." This is a guy who I didn't ask him to come up and tell

me this. [¶] [THE COURT]: Mr. Kelvin, you went down to Hayward for a misdemeanor, and you could have had this Court call down there? [¶] [MR. KELVIN]: You know, Judge, those are the facts. I'm not going to sit here and lie about them. I've been in my bed since 4:00 o'clock yesterday afternoon. And I got up this morning and I felt worse than I did yesterday. That's just—those are the facts as I'm aware of them. If the Court's position is I have to proceed with the trial, then that's what I'm going to do. I'm not able to do the things that I need to be doing. I can't concentrate. All I can think about is how bad my back hurts and that's the situation. . . ." The court then recessed for a minute and when trial resumed, asked defense counsel if he had taken any medication. Defense counsel responded that he was taking Vicodin and had last taken one at 5:00 a.m. He also informed the court that he had taken one at 4:00 p.m. and at 8:00 p.m. the previous day. Counsel reiterated that he could not do what was required of him, that his back hurt "pretty bad" and described his pain level as worse than the "seven or eight" it had been on Saturday. The court then continued the matter to the following day. But before the court could adjourn for the day, defense counsel requested some time to discuss jury instructions and to work with a computer technician to set up a video. The court became exasperated with counsel, telling him, "I can't believe I'm having this discussion where you say you have to be home, you need to be resting and you're talking about doing this computer. I can't believe I'm having this discussion. [¶] Go ahead, Mr. Kelvin. I expect you here tomorrow morning to be prepared."

The following day, July 1, 2009, defense counsel presented the court with a note from

Highland, stating he was to be off work until July 6. Counsel stated, "I understand that that can't happen, but just want to say for the record I feel today like I felt yesterday, which is not good. I would ask that this be placed in the file. It's a letter from Alameda County Medical Center regarding the state of my health." The court asked counsel about his state of mind. Defense counsel responded, "It's pretty much like it was yesterday. I'm in a lot of pain, but I don't want all these people sitting here and waiting for me. I feel bad about it. So I'll proceed." The following discussion ensued: "[THE COURT]: "There is a threshold of pain. As I said to you, I'm in pain today, and I've been that way for six years. That's just something I deal with. And sometimes it's worse than on other days. That's just what I deal with. I mean, to that extent that's what I'm asking you. Yes, you are in pain? [¶] [MR. KELVIN]: Yes. And I understand that we have to make sacrifices. All I can say is as long as I'm lying down in a bed, you know, taking medication with a heating pad under me, I'm fine. But when I get up and start walking around, it's fairly painful. So getting in the courtroom today was a process. But hopefully as long as I'm—I'm planted in a chair and I'm going to go ahead. [¶] [THE COURT]: Let's keep you in the chair. I don't have any reason for you to stand up." Defense counsel indicated that Andrew Kapur, an attorney that he works with, would be assisting him to play some recorded statements of Crowder, and the prosecutor also expressed his willingness to assist defense counsel with exhibits.

Trial then proceeded at 9:08 a.m. with the completion of the direct and cross-examination of Crowder, and the examination of Michelle Dilbeck, an expert in the field of firearms examination, Ann Keeler, an expert in the field of gunshot

residue, and police officer Todd Sabins. The court's minutes reflect that the court took three recesses ranging in time from 16 minutes to 23 minutes, with the court adjourning for the day at 1:29 p.m.

Prior to adjourning, the court remarked, "I want to say for the record, having observed Mr. Kelvin today, he's had an incredibly extensive cross-examination of each of the witnesses. He has performed as he generally does. He has moved slowly, but he's been up and down, and he's approached the witness, he's looked at exhibits, and I just want to make sure the record is clear as it relates to that activity and the fact that his—it doesn't appear that anything suffered in terms of his abilities here, because he's clearly the David Kelvin that I know in the courthouse." Defense counsel responded that he was in some pain and distress but was trying to do the best he could.

Trial resumed on July 2, 2009, without any request by defense counsel for a continuance or accommodation for his back problem. The prosecution and defense both rested their cases.

On Monday, July 6, 2009, trial resumed with the court commencing jury instructions. The court declared a brief recess almost immediately as one of the jurors felt ill and needed a five minute break. Defense counsel informed the court that he was not feeling well and then proceeded to discuss a jury instruction issue. In the midst of that discussion, defense counsel implied that he would have given the court case authorities earlier but "I can't even walk. I can't get out of my car. It took me a half an hour to walk two blocks, and I'm doing the best I can. I apologize." In response, the court remarked that he appreciated that defense counsel was making his record. The parties proceeded to

> discuss jury instructions, followed by the court's instructions to the jury, and closing arguments and the court's final instructions to the jury. The jury retired for deliberations. In noting his availability for the following day, defense counsel noted that he had a motion in Department 115 and a trial in Department 130.

(Op. at 7-13.)

After a thorough review of the record, the Court of Appeal rejected Petitioner's claim:

> The trial court has broad discretion in determining whether good cause exists to grant a continuance of the trial. (§ 1050, subd. (e).) "'The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 972, quoting *People v. Laursen* (1972) 8 Cal.3d 192, 204.) "In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126.) Defendant bears the burden of demonstrating that the court's denial of a continuance was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)
>
> While we do not condone the trial court's interjection of its own back pain threshold into its analysis of defense counsel's pain issue, our review of the record convinces us that the court did not abuse its discretion.

First, it is unclear from the record whether defense counsel's emergency room doctor ordered that he not return to work for five days. The doctor's note that counsel provided to the court indicated simply that he was restricted from work that required repetitive bending. [FN7] Second, although defense counsel claimed to be both in significant pain and under the influence of Vicodin, the record reflects that he nevertheless proceeded to cross-examine several prosecution witnesses and appeared to be engaged in the trial. The court took two recesses, of 17 and 28 minutes, in the four-hour-long court day, and a third recess of four minutes. Defense counsel did not indicate at any time during that court day that he was unable to proceed, and the court later remarked on counsel's thorough cross-examination.

> FN7. The note from the emergency room physician is not in the record.

When defense counsel informed the court the following day that he was still in significant pain, the court recessed for the day. The court, however, noted for the record that counsel had not left the court immediately upon adjournment the previous day but had spent another 15 minutes working with the video equipment. The court was also chagrined to learn that defense counsel had driven to another court in Hayward that afternoon rather than resting. [FN8].

> FN8. Although the court continued the matter for a day, it did so only after reminding defense counsel that he was not to go to other courts that day: 'Mr. Kelvin, here's what I'm telling you right now: If I'm going to continue and delay this case because you have this back pain and you say that you can go down and

make an appearance at another court, I'm questioning your representation.

Finally, when trial resumed on July 1, 2009, defense counsel, although giving the court a note from Highland Hospital stating he should be off work until July 6, [FN9], and informing the court that he was still in pain, did not request a continuance but told the court that he would proceed with the trial. Again, the record reflects that counsel performed diligently in cross-examining witnesses and engaging in discussions with the prosecutor and the court. The record further reflects that counsel complained a final time about pain on July 6, 2009 during a discussion on jury instructions but notably did not request a continuance but rather proceeded to argue about jury instructions. In addition, when the jury retired for deliberations, counsel informed the court of his scheduled appearances in other court rooms for the following day, one of which included a trial.

FN9. The letter is not part of the record.

In sum, the record demonstrates that defense counsel, despite complaints of back pain and sporadic requests for continuances, proceeded to provide [petitioner] with effective representation. Even if we were to conclude that the court abused its discretion in denying counsel's initial request for a continuance, there is simply no showing that defendant was prejudiced.

People v. Crovedi (1966) 65 Cal.2d 199, 201, cited by [petitioner], is inapposite. That case involved the issue of defendant's right to counsel of choice. There, the defendant's attorney suffered a heart attack after the first four days of trial. The court continued the matter for two weeks and then denied defendant's request for a continuance even

though his attorney's law partner presented medical documentation that defendant's counsel would not be able to resume the trial until seven weeks later. (*Id.* at pp. 201-202.) Instead, over the defendant's and the law partner's objections, the court appointed the law partner to represent defendant, allowing him only one week to prepare for trial. (*Id.* at p. 203.) Our Supreme Court held that the trial court's refusal to permit the defendant to be represented by his counsel of choice constituted a denial of due process. (*Id.* at p. 208.) [FN10]

> FN10. *People v. Panah* (2005) 35 Cal.4th 395 (*Panah*), cited by [petitioner], is also of no assistance to him. That case, like *Crovedi, supra*, involved an issue of choice of counsel. (*Panah, supra* at pp. 426-427.) While the defendant there requested a continuance to permit his secondary counsel to recover from a back injury, the court questioned the true reasons for the request, noting that defendant's primary counsel had already informed the court that his secondary counsel was not qualified to try the case and that he was making 97 percent of the decisions in the case. (*Id.* at pp. 423-424.) The court ultimately removed the secondary counsel and replaced him. (*Id.* at p. 426.) *Panah*, while concluding that the court did not abuse its discretion in denying a continuance, did not involve a situation where counsel is present in court and the court has the opportunity to observe counsel's abilities and physical appearance

Here, by contrast, defense counsel appeared in court and although he complained of pain, he continued to afford [petitioner] effective representation. "[W]here defense counsel present in court

> requests a continuance on the grounds of illness, a factual issue is presented for the trial court as to whether the attorney's condition precludes him from effectively proceeding with his defense [citations]." (*People v. Augustine* (1968) 265 Cal.App.2d 317, 329.) The trial court, based on its discussions with and observation of defense counsel in court, determined that counsel was not incapacitated and that he was fully able to proceed with the trial. Our review of the record substantiates the trial court's observations. Not only did defense counsel provide [petitioner] with adequate representation, he did so in the face of overwhelming evidence of Esho's and Crowder's eyewitness identifications of [petitioner] as the shooter.

(Op. at 13-16.)

To establish a constitutional violation based on the denial of a continuance motion, a petitioner must show that the trial court abused its discretion through an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Houston v. Schomig*, 533 F.3d 1076, 1079 (9th Cir. 2008) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)) (finding trial judge acted within his broad discretion in denying motion for continuance to retain private counsel). In addition, the improper denial of a requested continuance warrants habeas relief only if there is a showing of actual prejudice to petitioner's defense resulting from the trial court's refusal to grant a continuance. *See Gallego v. McDaniel*, 124 F.3d 1065, 1072 (9th Cir. 1997).[2]

---

[2] *Accord Brecht v. Abrahamson*, 507 U.S 619, 637 (1993) (habeas petitioner not entitled to relief unless record demonstrates actual prejudice, i.e , that trial error had (continued...)

A requisite abuse of discretion will be found if, after carefully evaluating all relevant factors, it is concluded that the denial is arbitrary or unreasonable. *See Armant v. Marquez*, 772 F.2d 552, 556 (9th Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986). When considering whether there has been an abuse of discretion, the court looks to four factors: (1) the degree ,of diligence by the defendant prior to the date beyond which a continuance was sought; (2) whether the continuance would have served a useful purpose if granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the amount of prejudice suffered by the defendant as a result of the court's denial. *See id.*; *see, e.g., United States v. Thompson*, 587 F.3d 1165, 1173-75 (9th Cir. 2009) (finding district court did not abuse its discretion in denying defendant's request for reappointment of counsel/continuance at final pretrial conference, held three and a half years after the initial pretrial conference; request was made for purposes of delay and to disrupt proceedings); *Gallego*, 124 F.3d at 1072 (district court did not err in denying habeas relief where petitioner did not show actual prejudice to defense from trial court's refusal to grant continuance).

Petitioner's claim is without merit because the trial court's denial of a continuance was neither arbitrary or unreasonable as determined by the state appellate court. The state court opinion reflects a thorough review of the record as shown by its detailed account of what occurred at trial with

---

(...continued)
substantial and injurious effect or influence in determining the jury's verdict).

respect to counsel's requests for a continuance based on his back troubles. With respect to the first two factors under *Armant*, 772 F.2d at 556, there was first no diligence by counsel prior to June 29, 2009, when he requested a continuance in court, and second, it seems unlikely that a continuance would have served a useful purpose since counsel continued to work on other trial matters after the trial recessed the same day. *See supra* at 11. With respect to the third factor, the continuance would have inconvenienced the court and the opposing party because the trial had already been in recess for two weeks prior, and the prosecution wanted to proceed. *See supra* at 9. Lastly, it does not appear that the defendant was prejudiced by the denial because, as the trial court observed, counsel was performing "well and beyond anybody" with cross-examination that day. *Id.* at 11. These factors do not indicate an abuse of discretion by the trial court. Furthermore, the trial court duly considered the emergency room doctor's note, which only stated that counsel should refrain from repetitive bending. *Id.* at 9. To accommodate that directive, the court stated that they would take more frequent breaks and that counsel could remain sitting during cross-examination. *Id.* at 10. Counsel also had assistance from the DA's office with retrieving materials from his car. *Id.* Lastly, the state appellate court observed that during the four hours that the court was in session that day, counsel never indicated that he was unable to proceed. *Id.* at 14. Rather, as Respondent points out, counsel was able to conduct an extensive cross-examination of prosecution witness Shandon Massey during which he was able to effectively cast doubt on the reliability of his direct testimony. (Ans. at 18-19, citing to Ex. B at 392-93, 395, 385-402, 527, 413-14, 420 and 428.) Based on

these facts, the state court was not unreasonable in determining that the trial court did not abuse its discretion by denying a continuance on June 29, 2009.

The record also shows that the trial court did in fact grant one of counsel's requests for a continuance. The following day on June 30, 2009, when counsel again complained of back pain and indicated that he had been taking Vicodin, the court decided to continue the matter until the next morning. *See supra* at 11-12. The court granted the continuance despite its observation that counsel's performance "[was] totally contrary to the state of condition that [he] indicated that [he was] in yesterday." *Id.* at 11. Therefore it cannot be said that the trial court disregarded counsel's complaints of pain in an arbitrary manner. But even after the continuance was granted, counsel still wanted to discuss jury instructions and work with a computer technician, belying his insistence that he needed immediate rest. *Id.* at 12.

Although defense counsel continued to complain sporadically of pain during the remainder of the trial, he made no further requests for a continuance. Counsel presented a note from Highland Hospital on July 1, 2009, and continued to assert that he was in pain, but he agreed to proceed with the trial. *See supra* at 12. At the end of the day, the court noted that counsel "performed as he generally does" and "it doesn't appear that anything suffered in terms of his abilities here." *Id.* at 13. Indeed, the record shows that counsel was able to conduct an extensive and effective cross-examination of Brandon Crowder, a key prosecution witness: counsel was able to establish that Crowder repeatedly lied, made inconsistent statements, and withheld information

from the police on several occasions. (Ans. at 19, citing Ex. B at 531-32, 543-44, 546-48, 540-41, 554, 548-49, 554-55, 557, 585, 557-559, 559-64, 562, 569, 567-68, 569-70, 571-72, 578-80, 580-84.) Trial resumed the following day without any request by counsel for a continuance or accommodation for his back problem. *See supra* at 13. Counsel also thoroughly cross-examined Dayo Esho, casting doubt on his direct testimony. (Ans. at 20, citing Ex. B at 726-27, 736-45, 717-19, 719-23, 744-45, 729-34.) Before resting his case, counsel presented two Berkeley Police officers as defense witnesses and gave a vigorous closing argument, stressing the unreliability of Crowder's testimony and the weaknesses in the identification of Petitioner as the shooter. (Ans. at 20, citing Ex. B at 754-55, 765-66, 850-83.) After resting on Thursday, July 2, 2009, trial resumed on Monday morning, July 6, 2009, with the court commencing jury instructions. *See supra* at 13. Counsel complained of pain again during a discussion on jury instructions, but did not request a continuance. *Id.* The parties resumed the discussion on jury instructions, and after the jury retired for deliberations, counsel indicated that he had court appearances for other matters scheduled the following day. *Id.* This record demonstrates that defense counsel continued to provide Petitioner with effective representation such that Petitioner suffered no "actual injury" by the denial of a continuance. *See Brecht*, 507 U.S. at 637. Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

B. Refusal to Grant a New Trial

Petitioner's second claim is that the trial court erred by refusing to grant a new trial based on ineffective assistance of counsel (Claim 2) and based on newly discovered evidence (Claim 3).

1. New Trial based on Ineffective Assistance of Counsel (Claim 2)

The Court of Appeal rejected Petitioner's claim that a new trial was warranted based on ineffective assistance of counsel:

> In order to prove a claim of inadequate representation, a defendant must show that "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Effective and competent representation requires "counsel's 'diligence and active participation in the full and effective preparation of his client's case.' [Citation.]" (*Id.* at pp. 424-425.) We will reverse a conviction on the ground of inadequate counsel only if the defendant affirmatively shows that the omissions of defense counsel cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Zapien, supra,* 4 Cal.4th at p. 980.) The defendant must also establish prejudice from counsel's acts or omissions. Ordinarily prejudice must be affirmatively proved; the defendant must establish the reasonable probability that had counsel not been incompetent, the proceeding would have had a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)
>
> In his motion for a new trial, defendant alleged that his counsel's back pain prevented him from providing effective representation. In particular, defense counsel's declaration submitted in support of

the motion averred that due to his back pain, his "contact visits with [petitioner] [] during trial were infrequent and brief" and that he was unable to devote any time outside of court to meet with him and prepare him to testify. He further declared that a recent MRI showed that he had bulging discs at L4-L5 and L5-S1, impinging on a nerve and that he was awaiting corrective surgery.

The trial court properly denied the motion. "[T]he trial court is in the best position to make an initial determination, and intelligently evaluate whether counsel's acts or omissions were those of a reasonably competent attorney." (*People v. Jones* (1981) 123 Cal.App.3d 83, 89.) This was not defense counsel's first case before the trial court; the court was familiar with defense counsel, and acknowledged that he tried this case in accordance with his usual standards, noting that his "performance [was] totally contrary to the state of condition that you indicated that you were in . . ." The court further commented that defense counsel "performed as he generally does. He has moved slowly, but he's been up and down, and he's approached the witness, he's looked at exhibits . . . and the fact that his—it doesn't appear that anything suffered in terms of his abilities here, because he's clearly the David Kelvin that I know in the courthouse."

The record reflects that defense counsel informed the court that he did not intend to call [petitioner] to testify. At no point did defense counsel subsequently tell the court that he had changed his mind on that issue or that he needed additional time to prepare defendant to testify. The defense theory was that Crowder was lying and defense counsel sought both in his cross-examination and in closing argument to discredit Crowder and the other prosecution witnesses. We cannot

> second guess defense counsel's strategy. While in hindsight he claimed that [petitioner] would have testified, [petitioner]'s testimony would have been problematic as he had made pretrial incriminatory statements and had suffered a prior conviction involving gun use. Moreover, our review of the record persuades us that [petitioner] was not prejudiced by his counsel's decision. In view of the eyewitness testimony that [petitioner] was the shooter, it is not reasonably probable that defendant would have received a more favorable verdict. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

(Op. at 16-18.)

In reviewing this claim, the Court will look to the underlying argument that counsel rendered ineffective assistance. In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective" standard of reasonableness" under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Court has already evaluated counsel's performance in light of his back-pain in rejecting the first claim involving the denial of a continuance. Simply put, Petitioner cannot show that he was prejudiced by any alleged deficiency in counsel's performance. *Strickland*, 466 U.S. at 694. Rather, counsel was able to conduct extensive and thorough cross-examinations of the prosecution's witnesses,

present defense witnesses, and give a vigorous closing argument. *See supra* at 17-18.

With respect to counsel's declaration that his back injury kept him from having Petitioner testify, (Pet. Ex. B at 4), the Court of Appeal noted that the record showed counsel actually informed the court that Petitioner did not intend to testify, and "[a]t no point did defense counsel subsequently tell the court that he had changed his mind on that issue or that he needed additional time to prepare defendant to testify." *See supra* at 20. By his declaration, counsel also fails to set forth what Petitioner would have testified to or how his testimony would have affected the outcome in favor of Petitioner. On this basis, the state appellate court found little merit in counsel's contention in hindsight that he would have had Petitioner testify because such testimony would have been more problematic than beneficial, especially considering Petitioner's pretrial incriminatory statements and prior conviction involving gun use. *Id.* Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

2. New Trial based on Newly Discovered Evidence (Claim 3)

The Court of Appeal also rejected the claim based on new evidence:

> Defendant also argues that the court should have granted a new trial based on newly discovered evidence. In support of his motion for a new trial, defendant submitted

the declarations of two friends, Elisha Nelson and Amber Hill. Nelson declared that she was a friend of Ronald Benjamin, who was now deceased. She stated that Benjamin told her at her birthday party on September 4, 2006 that he had shot someone earlier in the day. He asked her to keep the information to herself but when she heard of defendant's conviction, she got in contact with defendant's counsel. Hill, in turn, averred that she was friends with both defendant and Benjamin and that she was at the scene of the shooting. She was with defendant when the fight broke out between two men outside Blakes. She and defendant followed a crowd of people around the corner. The smaller of the two men fighting challenged people in the crowd, including Benjamin, and swore at them. She heard a gunshot and declared that defendant did not have a weapon in his hand and did not fire any shot, but that the sound of the gun came from where Benjamin was standing.

"A defendant on a motion for a new trial based on newly discovered evidence must show . . . that the evidence is in fact newly discovered; that it is not merely cumulative to other evidence bearing on the factual issue; that it must be such as to render a different result probable on a retrial; and that the moving party could not, with reasonable diligence, have discovered and produced the evidence at trial." (*People v. McDaniel* (1976) 16 Cal.3d 156, 178.)

Here, defendant failed to show that the evidence was newly discovered or that it could not have been discovered and presented at trial. As the trial court remarked prior to denying the motion: "I find it fascinating that Ms. Nelson visited [petitioner] 21 times in the Santa Rita Jail. The 21 times in all this interaction, there's never been any

> information that the lawyers derive from her or defendant that she was a witness and could corroborate certain facts and circumstances in this case. . . . I don't know if it's coincidental that Mr. Benjamin, who is dead, is said to have said that before he died sometime that he shot somebody off around the corner from Telegraph. If it's coincidental or not, I don't know." Indeed, the record reflects that Nelson visited [petitioner] 21 times between May 16, 2008 and March 22, 2009, well before trial commenced. On these facts, her declaration that she acceded to Benjamin's request to keep his information confidential, and felt compelled to reveal it only after hearing of defendant's conviction lacks credibility. In addition, as the court noted, Nelson's declaration does not state that Benjamin shot Drummond, only that he shot "someone." Finally, defendant failed to show that Hill's declaration was newly discovered. Her declaration was also questionable. As an eyewitness at the scene of the crime, and a friend of defendant's, the timing of her statement alone was cause for suspicion. Moreover, she did not aver that Benjamin was the shooter, just that the sound of the gunshot came from where he was standing.
>
> The trial court justifiably denied the new trial motion based on this evidence, and based on the absence of any showing that this evidence could not have been discovered and produced at trial. [FN11]
>
> > FN11. By separate order today, we deny defendant's petition for writ of habeas corpus.

(Op. at 18-19.)

Respondent asserts that the claim is essentially one of actual innocence that has no merit. (Ans. at 26.) "Claims of actual innocence based on newly

discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390,400 (1993). "This rule is grounded on the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Id.* (citations omitted). However, there is a narrow exception established by the Supreme Court that limits a "miscarriage of justice" exception to habeas petitioners who can show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citing *Murray v. Carrier*, 477 U.S. at 496); *see Johnson v. Knowles*, 541 F.3d 933, 936-38 (9th Cir. 2008) ("[t]he miscarriage of justice exception is limited to those extraordinary cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt."); *see, e.g., Wildman v. Johnson*, 261 F.3d 832, 842-43 (9th Cir. 2001) (petitioner must establish factual innocence in order to show that a fundamental miscarriage of justice would result from application of procedural default). The required evidence must create a colorable claim of actual innocence, that the petitioner is innocent of the charge for which he is incarcerated, as opposed to legal innocence as a result of legal error. *Schlup*, 513 U.S. at 321. It is not enough that the evidence show the existence of reasonable doubt; petitioner must show "that it is more likely than not that no 'reasonable juror' would have convicted him." *Id.* at 329. As the Ninth Circuit has put it, "the test is whether, with the new evidence, it is more likely than not that no reasonable juror would have found [p]etitioner

guilty." *Van Buskirk v. Baldwin*, 265 F.3d 1080, 1084 (9th Cir. 2001). Here, Petitioner's proffered evidence does far from establish his actual innocence; at most, they are attempts at raising reasonable doubt which is insufficient.

On the other hand, Petitioner asserts that this claim is grounded in due process because the trial court should not have denied the motion without an evidentiary hearing. (Trav. at 33.) However, it appears that the trial court-duly considered the declarations and reviewed their content before the denying the motion. The court was justifiably unconvinced that the evidence was credible and could not be discovered and produced at trial. The court noted that Ms. Nelson visited Petitioner 21 times while he was in jail, which made it highly suspicious that such information did not come to light sooner. *See supra* at 22. Furthermore, her frequent visits to Petitioner made it less credible that she felt compelled to reveal the information only after hearing of Petitioner's conviction and conveniently, only after Benjamin had died. *Id.* Lastly, the content of the information—that Benjamin shot "someone"—does not conclusively show that Benjamin—and not Petitioner—was the one who actually shot Drummond. *Id.* Likewise, Hill's declaration was also questionable. The trial court was not unreasonable in finding that the timing of Hill's statement was suspicious in light of the fact that she was an eyewitness to the incident and a friend of Petitioner. Furthermore, her statement that "the sound of the gun came from where Benjamin was standing" does not establish that Benjamin himself was the shooter and definitively prove Petitioner's innocence. *Id.* Ultimately, the newly discovered evidence, which is highly suspicious and could have easily been discredited by the

prosecution if presented at trial, was not likely to have changed the outcome of the trial. Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

C. Ineffective Assistance of Counsel (Claims 4-8)

Petitioner's final claims are based on his counsel's insufficient performance throughout the course of the trial. The state high court summarily denied these claims which were presented in habeas petitions. *See supra* at 2.

As discussed above, Petitioner must establish two things in order to prevail on a Sixth Amendment ineffectiveness of counsel claim. *Id.* at 20. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The *Strickland* framework for analyzing ineffective assistance of counsel claims is considered to be "clearly established Federal law, as determined by the Supreme Court of the United States" for the purposes of 28 U.S.C. § 2254(d) analysis. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011). A "doubly" deferential judicial review is appropriate in

analyzing ineffective assistance of counsel claims under § 2254. See *id.* at 1410-11. The general rule of *Strickland*, i.e., to review a defense counsel's effectiveness with great deference, gives the state courts greater leeway in reasonably applying that rule, which in turn "translates to a narrower range of decisions that are objectively unreasonable under AEDPA." *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). When§ 2254(d) applies, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 131 S. Ct. at 788.

1. **Failure to Renew Request for Continuance and to Inform the Court that Petitioner Wanted to Testify (Claim 4)**

Petitioner claims that counsel was ineffective for failing to renew his request for a continuance and for failing to inform the trial court that he intended to have Petitioner testify. (Pet. Attach. at 10.) As discussed above, this Court found that the state appellate court reasonably rejected the related claims that the state trial court erred in denying a continuance or a motion for a new trial based on its determination that Petitioner was not prejudiced. *See supra* at 17-18, 20-21. Furthermore, counsel did in fact renew the request the following day and obtain a one day continuance. *Id.* at 17. Lastly, counsel's declaration indicates that he did not believe that he would have been granted a continuance if he had renewed his request in light of the trial court's belief that counsel was fully capable of proceeding. (Pet. Ex. B at 2.) If that was the case, trial counsel

cannot have been ineffective for failing to raise a meritless motion. *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996). Ultimately Petitioner cannot show that he was prejudiced by counsel's failure to renew his motion, i.e., that the result of the proceeding would have been different but for this alleged error. *Strickland*, 466 U.S. at 694.

Petitioner's second assertion is that counsel was deficient for failing to inform the court that he wanted to have Petitioner testify. In his state habeas petition before the Court of Appeal, Petitioner asserts that he would have testified as follows:

> On September 4, 2006, Ronald Benjamin and other people called me to a party in Berkeley near the record store on Telegraph Avenue. I drove there alone. I saw Brandon Crowder there—I didn't know his name at that time but he looked familiar. He came up to see me and other people and said he had marijuana for sale. My friend Ronald Benjamin was going to buy some but then Crowder offered to smoke some with us because of the girls that were standing around. The party ended shortly after that.
>
> I did not see Benjamin and so I went in front of Larry Blake's Club on Telegraph to wait for him. I heard a shot go off and people ran back inside the club. Five or ten minutes later the party-goers, including myself, came back out. That was when I saw Crowder who was about to fight someone (whom I later learned was Wayne Drummond), but the police were right there so the fight moved up the street. The crowd, including myself, followed the fight until we were in front of Tower Records. Crowder and Drummond were still about to fight.

I saw Benjamin with another guy and then walked away from where I had been standing near Amber Hill and walked over to Benjamin to watch the fight. Crowder looked over at me and Benjamin and said, "Y'all get him." In response to that Drummond ran up to our group and threatened everyone saying, "I'm going to fuck you up" and pointing to me. I thought at first that the group of people standing next to me was going to jump Drummond but then out of nowhere Benjamin pulled out a gun. Drummond was right in front of Benjamin and tried to take the gun from him. They fought over the gun back and forth and then the gun went off. People started running up and down the street.

At first I thought Benjamin had shot the sidewalk and missed Drummond because Drummond took off running up near the street and Benjamin went after him. I stood with the group of people around me and watched as Benjamin and Drummond went up the street. A friend of Drummond's who was standing next to me (whom I later learned was Dayo Esho) said, "Leave us alone, we don't want any problems." I told him, "I don't have nothing to do with that dude (meaning Drummond because I didn't know his name)." Esho then walked up the street after Drummond. I returned to Larry Blake's. After about five minutes I drove back to East Oakland.

The next day some people called and told me that the guy Benjamin "got into it with" died. I tried to call Benjamin but he didn't answer his phone for a few days. When I finally contacted him, he didn't want to talk about what happened, so I left it alone, so he wouldn't think I was trying to set him up. He was the kind of person that would say, "What, are you the police?" if you ask too

> many questions and I didn't want to get that thought in his head.
>
> I didn't even know Benjamin had a gun on him that night because we didn't come together, and he never said anything about it when I got to the club. I was just standing there when the whole thing happened, just like Esho and everyone else who was just standing there watching. I didn't push Benjamin to fight or help him in any way.
>
> I was going to testify to these facts at my trial. Mr. Kelvin was going to prepare me for testifying. But in the middle of our preparations he got sick and said he could not come to see me, and he couldn't carry his laptop and paperwork that we needed to get started. I asked Mr. Kelvin to just put me on the stand to testify out he said it wouldn't be good to do that. I never said anything to the judge because at the motion for new trial, Mr. Kelvin argued that I should have a new trial so I could testify.

(Ans. Ex. A, Ex. F at 1-3.)

Whether this self-serving testimony would have resulted in a more favorable outcome is unlikely because it is at odds with the strong testimonies of the key witnesses presented at trial. Notwithstanding his plea agreement, Crowder presented persuasive testimony identifying Petitioner as the shooter. It is undisputed that Crowder was familiar with Petitioner prior to the incident: Crowder knew Petitioner since middle school, and they had smoked marijuana together earlier on the night of the incident. *See supra* at 6. Crowder also stated that as they were verbally fighting, Drummond said, "I'll fuck you up," to Crowder, Petitioner and an unidentified third person. *Id.* Then Petitioner pulled out a gun, pointed it at Drummond's neck and demanded his money. *Id.*

The two then struggled over the gun, resulting in Petitioner shooting Drummond. *Id.* Crowder's testimony was corroborated by Shandon Massey and Dayo Esho, who also testified that they heard Drummond say "I'll fuck you up," and the shooter demand Drummond's wallet. (Ans. Ex. B at 174-75, 368-69, 370-71, 386-88, 431-32, 684-85, 688, 714-15.) In contrast, Petitioner makes absolutely no mention of this demand for money. In addition to Crowder's identification, Esho positively identified Petitioner as the shooter at the preliminary hearing and at trial. *See supra* at 5. Lastly, although Massey was not absolutely sure that Petitioner was the shooter, he was able to state hat a picture of Petitioner showed a man with "similar characteristics." (Ans. Ex. B at 390, 627-29, 645-46, 656-57.)

Furthermore, it is not likely that a jury would give much credence to Petitioner's version of events in light of the incriminating statements he made to Crowder during their transport from the Berkeley jail to the North County jail during trial on February 19, 2008. Petitioner's recorded comments to Crowder included the following: "You think it's hard now? Shit's about to get real out there. . . Respect my gangster . . . No turning back"; "You just better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again"; "Man, fuck this . . . timing man. If you would have kept your mouth shut, we wouldn't be in this shit. You just don't know where everything is." *See supra* at 5. These statements indicate a strong consciousness of guilt and includes no claim of mistaken identify or any reference to another possible shooter, much less any mention of Benjamin by name.

Because Petitioner's testimony was not likely to have changed the outcome of the proceedings, it cannot be said that Petitioner was prejudiced by counsel's actions. *Strickland*, 466 U.S. at 694. Indeed, under the doubly deferential view, *see Pinholster*, 131 S. Ct. at 1410-11, the Court finds that counsel acted reasonably in ultimately not having Petitioner testify. *See Harrington*, 131 S. Ct. at 788. As the state appellate court pointed out, Petitioner's testimony would have been problematic "as he had made pretrial incriminatory statements and had suffered a prior conviction involving gun use." (Op. at 18.) Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

2. Failure to Adequately Investigate and Present Exculpatory Evidence (Claim 5)

Petitioner claims that counsel was ineffective for failing to investigate and present additional evidence that Benjamin was the shooter. (Pet. Attach. at 11.) Specifically, Petitioner points to the declarations of Elisha Nelson and Amber Hill to that effect, as discussed under Petitioner's claim involving newly discovered evidence. *See supra* at 21-22. The relevant part of Nelson's declaration is as follows:

> On September 4, 2006, I had a party for my 19th birthday at my mother's house in Oakland. One of the persons at this party was Ronald Benjamin. He passed away in 2008. He attended Willard Middle School and Berkeley High School and was a friend of [petitioner] and also a friend of mine. He was

> approximately six feet one and dark complexioned.
>
> At this party, I overheard Benjamin telling his friends about shooting someone earlier that day. I spoke with him privately and asked what happened. Benjamin told me he had been in Berkeley in Telegraph Avenue when someone called him a bitch and he shot that person. He asked that I keep this information to myself, which I did until I read the newspaper that [Petitioner] was convicted of this crime. I then contacted a relative of [Petitioner] who put me in touch with counsel for [Petitioner].

(Ans. Ex. A at 365-66.)

The following is the relevant excerpt from Hill's declaration:

> I am a friend of [Petitioner] and was a friend of Ronald Benjamin, deceased. I was present at Larry Blake's in Berkeley on a date I do not exactly recall. The incident I observed was memorable and I have no doubt about what I observed. It was late and I was leaving Blake's. I saw [petitioner] outside and we began talking. An argument began between a big person and a small person. Both of them were black males. These persons went around the corner from Blake's and a crowd of people followed, including myself and [Petitioner].
>
> The small person appeared to be intoxicated. He challenged people in the crowd for no reason, insulting them with curse words. One of those he challenged was Ronald Benjamin, who pulled out a pistol and approached the small person. [Petitioner] pushed me away. I heard a gunshot. I can testify from personal knowledge that [Petitioner] had no weapon in his hand, did not fire any shot, and did not approach the

> small person. I did not see Benjamin fire a shot, but the sound came from where he was standing. I did not know at the time anyone had been struck by the gunshot I heard.
>
> Over the years I lost contact with [Petitioner]. He did not have my telephone number. I did not know he was arrested for this incident at Blake's. I read in the newspaper he had been convicted of the shooting at Blake's. I went to visit him in custody. He asked if I would give a statement. I agreed because he did not commit the crime and a big mistake has been made.

(*Id.* at 374-75.)

As discussed above, the Court has determined that even with this newly discovered evidence, which is highly suspicious and easily discredited, Petitioner has failed to show that it is more likely than not that no reasonable juror would have convicted Petitioner. *See supra* at 23-24. Furthermore, this Court must presume correct any determination of a factual issue made by the state court unless Petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(l). For purposes of § 282254(e)(1), factual issues are defined as "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Coombs v. Maine*, 202 F.3d 14, 18 (1st Cir. 2000) (citations and internal quotation marks omitted). Here, Petitioner has failed to rebut the state court's finding that the declarations were not credible with clear and convincing evidence as he merely relies on the content of the declarations alone.

Ultimately, Petitioner fails to show that he was prejudiced by counsel's failure to present this evidence. Even if the jury had heard the testimonies

of Nelson and Amber, it was not likely to have changed its verdict. Nelson's reliability was highly questionable, particularly in light of the fact that she visited Petitioner 21 times in jail prior to trial. It is unlikely that she was completely unaware that Petitioner was in jail and facing trial for the Berkeley murder despite her assertion in the declaration that she came forward only after she found out about the conviction in the paper. *See supra* at 28. It is hard to fathom why she withheld such exculpatory evidence from Petitioner during all of these visits, until after the fact of Petitioner's conviction, and especially after Benjamin's death in 2008, which was well before Petitioner's trial had concluded.

With respect to Hill's statement, she did not definitively state that she saw Benjamin fire the shot that struck Drummond, only that the sound came from where he was standing. *See supra* at 29. This lone testimony to that effect was not likely to persuade the jury that Petitioner was not the shooter in light of the strong eyewitness testimonies presented by Crowder, Esho and Massey and Petitioner's own incriminating statements. Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

3. Failure to Challenge Juror for Bias (Claim 6)

Petitioner claims that counsel was ineffective for failing to strike Juror No. 10 based on bias. (Pet. Attach. at 14.)

Juror No. 10 was originally prospective Juror No. 54. During jury selection, this juror stated that she

was an attorney practicing family law in Oakland, and had worked previously for the California Attorney General's Office, a District Attorney's Office, and a Public Defender's Office. (Ans. Ex. O, Appendix Ex. G at 32-33.) She stated that she would have no difficulty following the court's instructions and would not be "rooting or hoping for one side versus another." (*Id.*) She also stated that her husband was an attorney with the Alameda County Counsel's Office, but that "nothing about that would affect [her] here." (*Id.* at 33.)

During the trial, Juror No. 10 sent the court a note explaining that her husband had told her that he had an ongoing trial with defense counsel. She stated that her husband told her that counsel had "showed up late to the last trial," and her husband had talked to her "about it a little bit." (Ans. Ex. B at 494-95.) She also stated: "And I guess the trial was going on before this trial even started, and so he talked to me about it before then without us realizing." (*Id.* at 495.) When the trial court asked her, "'what impact does that have on you and your ability to be a fair and impartial juror?", she replied, "I don't think it has an impact." (*Id.*) Then Juror No. 10 and counsel had the following exchange:

> Q. Is your husband upset that he was delayed in starting his trial?
>
> A. I think he was, yes.
>
> Q. And what did he say about me in that regard?
>
> A. He said that you were late and you said part of the reason was because you had this murder trial going on.
>
> Q. Did he say anything else about why I was late?

A. You had another hearing or something going on that day.

Q. Is that all he told you?

A. Yes.

Q. So you're satisfied, despite the relationship with your husband, that your deliberations in this case won't be affected one way or another?

A. That's correct.

Q. You're not leaning [prosecutor's] Wellman's way because he was on time or anything like that?

A. No.

THE COURT: You wouldn't know if Mr. Wellman is on time or not, because you didn't start until 9:30 this morning, right?

JUROR NO. 10: We were late this morning.

THE COURT: You don't know what happened. To the extent of what's important, I know you're a lawyer also, and you understand the rules if there's some outside influence, and I've given you jurors beforehand, I want to know about it and I appreciate you bringing this to my attention. What's more important is that you can be fair and impartial to both parties and that something else outside is not going to influence how you decide this case.

JUROR NO. 10: That's right.

THE COURT: You think you can be fair and impartial?

JUROR NO. 10: I do.

(*Id.* at 495-496.)

To disqualify a juror for cause requires a showing of either actual or implied bias—"that s is . . . bias in

fact or bias conclusively presumed as a matter of law.'" *United States v. Gonzalez*, 214 F.3d 1109, 1111-12 (9th Cir. 2000) (quoting 47 Am. Jur. 2d Jury § 266 (1995)). Actual bias is bias in fact—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. *See Gonzalez*, 214 F.3d at 1112. Courts have found actual bias where, based upon personal experience, a potential juror stated he could not be impartial when evaluating a drug dealer's testimony, where a juror in a case involving embezzlement from a labor union emphasized his negative experiences with unions and responded equivocally when asked if he could render a fair and impartial verdict despite those views, and where a juror in a drug distribution case admitted to a conviction for marijuana possession, but stated that he believed it to be the product of entrapment. *See id.* (citing cases).

In extraordinary cases, courts may presume bias based upon the circumstances. Unlike the inquiry for actual bias, in which the court examines the juror's answers on voir dire for evidence that he was in fact partial, the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced. *See id.* Prejudice is to be presumed where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. *See id.*; *Tinsley*, 895 F.2d at 527. Applying this standard, courts have found implied bias in cases where the juror in question has had some personal experience that is similar or identical to the fact pattern at issue or where the juror is aware of highly prejudicial information about the defendant. *See Gonzalez*, 214 F.3d at 1112-13 &

n.4 (cataloguing cases in which implied bias was found); *Tinsley*, 895 F.2d at 527-29 (same).

Based on the record, the Court finds no basis for finding either actual or implied bias. It cannot be said that counsel was remiss in failing to challenge this juror during jury selection because there was no indication that either her work or that of her husband would cause her to be impartial, and no relevant personal experiences came to light which could raise concerns of actual bias. Counsel stated in his declaration that "[h]ad I been myself, I would have noticed the same last name—Massey—and that her husband was a lawyer with the Alameda County Counsel's office and I would have inquired." (Pet. Ex. B at 3.) However, this assertion is not persuasive because there is no indication in the record that counsel was not "[himself]" during jury selection and he only began to complain of back-pain in the middle of the prosecutor's case. Even counsel admits that he would not have been able to prove cause during jury selection had he moved to do so. (Ans. Ex. O Appendix Ex. S at 925.)

Nor can it be said that these circumstances are so extraordinary that the court may presume bias. Once she became aware of her husband's involvement in a case with defense counsel, the juror immediately informed the court and disclosed the extent of his discussions with her. Counsel asserts that her husband was "very angry and hostile" towards him during the trial, and that counsel "would have expected that [her husband] discussed the case with her." (Pet. Ex. B at 3.) Even so, it cannot be said that an average person in the position of Juror No. 10 would be prejudiced against counsel or Petitioner based on these circumstances. *See Gonzalez*, 214 F.3d at 1112. Juror No. 10's assertion

that she could remain fair and impartial was sufficient to satisfy the trial court, and its determination of juror partiality is entitled to a presumption of correctness on federal habeas review. *See Wainwright v. Witt*, 469 U.S. 412, 429 (1985); *Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *Dyer v. Calderon*, 151 F.3d 970, 974-76 (9th Cir.1998) (en banc) (presumption fails if state court fact-finding process was not objective or failed to reasonably explore issues presented and if the facts left undeveloped by the state court are material); *see also United States v. Alexander*, 48 F.3d 1477, 1484 (9th Cir.) (determination of impartiality particularly within province of trial judge), *cert. denied*, 516 U.S. 878 (1995).

Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

4. Failure to Challenge the Admission of Suggestive Identifications (Claim 7)

Petitioner claims that counsel was ineffective for failing to challenge the allegedly suggestive identifications of Petitioner by the prosecution witness Dayo Esho. (Pet. Attach. at 14.)

"A conviction which rests on a mistaken identification is a gross miscarriage of justice." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Thus, the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to

persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012) (citing rights to counsel, compulsory process, confrontation, cross-examination, as examples). Due process requires suppression of eyewitness identification evidence "when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* at 718; *see Manson v. Brathwaite*, 432 U.S. 98, 107-09 (1977); *Neil v. Biggers*, 409 U.S. 188, 196-98 (1972). The purpose of this rule is "to deter police from rigging identification procedures." *Perry*, 132 S. Ct. at 721. Consequently, in "cases in which the suggestive circumstances were not arranged by law enforcement officers," due process does not require exclusion of the identification evidence. *Id.* at 720-21 (holding due process does not require exclusion of evidence that witness, in response to a police officer asking her to describe the suspect, pointed out her window to defendant standing in her parking lot after another officer had asked him not to leave). "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Id.* at 721.

Petitioner challenges two photographic ("photo") lineups prepared by the police which were shown to Esho on February 14, 2008, almost two years after the incident. Each of the lineups included a different picture of Petitioner, and in both lineups, Esho pointed out Petitioner's photo as the closest but could not make a positive identification. (Ans. Ex. B at 190-92, 203-06, 621-26, 639-41, 711-13.) He indicated that he wanted to see Petitioner in person to be sure. *Id.* at 713-14. When Esho saw Petitioner at the preliminary hearing, he became sure that

Petitioner was the shooter, and later testified at trial that "I was just sure when I saw him. Just basically clicked." (*Id.* at 715.) Esho's identification was made more certain by the fact that he also recognized the "[s]ort of the way [Petitioner] walked." (*Id.*) At trial, Esho remained sure that Petitioner was the one who shot Drummond. (*Id.* at 716.)

In his petition, Petitioner makes no factual allegations as to why these photo lineups were impermissibly suggestive and unnecessary. *Perry*, 132 S. Ct. at 718. He did not provide copies of the lineups in his state habeas petition or in the instant action. Rather, he states that Esho's description of the shooter was that he was "6'1"—the same height as him—and with a darker complexion." (Pet. Attach. at 15, citing to Ans. Ex. B at 730-734.) Petitioner states that he is shorter than Esho and has a "medium complexion." (*Id.*) However, he makes no argument as to why this difference in physical description is relevant as evidence that the lineups were unduly suggestive. Rather, Petitioner relies on counsel's declaration that he does not recall why he did not challenge Esho's identification and that in hindsight he should have done so. (*Id.* at 16.) However, counsel also fails to provide specific facts in support of his belief that the identification procedures were suggestive and merely states that he was in great pain and mental distress as a result of his back injury. (Pet. Attach. Ex. B at 5.) But as the Court noted above, *see supra* at 33, there was no indication prior to June 29, 2009, when counsel made his first request for a continuance based on his back problem, that counsel was incapacitated early on in the proceedings. Certainly no mention of such a possibility was made during motions in limine when such a motion to suppress would have been appropriate. (Ans. Ex. B at 1-49.)

For the first time in his traverse, Petitioner asserts that the photographic lineups were suggestive because of repetition, i.e., only Petitioner's photograph was displayed in both lineups. (Trav. at 44.) He also asserts that the in-court identifications were unduly influenced by the suggestive lineups. (*Id.* at 45.) However, even if we assume that counsel's performance was deficient for failing to move to suppress the lineups, Petitioner fails to show that he was prejudiced because the subsequent in-court identifications were sufficiently reliable. *See United States v. Gibson*, 690 F.2d 697, 703-04 (9th Cir. 1982) (failure to make evidentiary objections does not render assistance ineffective unless challenged errors can be shown to have prejudiced the defense), *cert. denied*, 460 U.S. 1046 (1983).

In determining whether in-court identification testimony is sufficiently reliable, courts consider five factors: (1) the witness' opportunity to view the defendant at the time of the incident; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the time of the identification procedure; and (5) the length of time between the incident and the identification. *See Manson*, 432 U.S. at 114; *Neil*, 409 U.S. at 199-200. *See, e.g., United States v. Drake*, 543 F.3d 1080, 1089 (9th Cir. 2008) (finding that where first four factors weighed in favor of reliability, four-day delay between robbery and photo spread identification did not call identification's accuracy into question); *United States v. Jones*, 84 F.3d 1206, 1209-10 (9th Cir.) (although drive-by identification by witnesses was suggestive, it was permissible because there was not a substantial likelihood of misidentification), *cert. denied*, 519 U.S. 973 (1996); *United States v. Wang*, 49 F.3d 502, 505 (9th Cir. 1995) (identification of

defendant in photographs reliable where witness had ample opportunity to view defendant and actually spoke with him).

Although two of the factors above, i.e., the vagueness of Esho's prior description and the two years that had passed between the incident and the identification, weighs against reliability, the other three factors indicate that Esho's testimony was sufficiently reliable: (1) as Petitioner admits, Esho actually spoke with Petitioner immediately after the shooting; (2) Esho was paying attention as he clearly recalled Petitioner's apology and the distinctive way that Petitioner walked; and (3) Esho demonstrated a high degree of certainty when he identified Petitioner at the preliminary hearing and at trial. See *Manson*, 432 U.S. at 114.

Because Petitioner has failed to show that he was prejudiced by counsel's performance with respect to the identification procedures, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. 28 U.S.C. § 2254(d). Accordingly, Petitioner is not entitled to habeas relief on this claim. For reasons discussed below, see infra at 40, Petitioner shall be granted a certificate of appealability on this issue.

5. Conflict of Interest (Claim 8)

Petitioner's final claim is that counsel was essentially operating under a conflict of interest when the trial court denied his requests for a continuance and insisted that the trial proceed without further delay. (Pet. Attach. at 16-17.) Petitioner asserts that counsel should have done more, e.g., submitted more medical documentation to support his need for bed rest or simply stayed home,

rather than continue to appear because he did not want to make the trial court angry with him. (*Id.* at 18.) Because counsel was placed "in the impossible situation of having to choose between his own interests and his client's," the result was an "unconstitutional conflict of interest." (*Id.*)

The Sixth Amendment guarantee of assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence, *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970), and the right to counsel's undivided loyalty, *Wood v. Georgia*, 450 U.S. 261, 271-72 (1981). A criminal defendant accordingly is entitled under the Sixth Amendment to an effective attorney who can represent him competently and without conflicting interests. *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994). If counsel is prevented by a conflict of interest from asserting his client's contentions without fear or favor, the integrity of the adversary system is cast into doubt because counsel cannot play the role necessary to ensure that the trial is fair. *See Strickland*, 466 U.S. at 685.

The Sixth Amendment's right to conflict-free counsel is violated only if the conflict "adversely affected" trial counsel's performance. *Alberni v. McDaniel*, 458 F.3d 860, 870 (9th Cir. 2006). "[A]n actual conflict of interest mean[s] precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (emphasis omitted).

Where counsel suffers from a potential or actual conflict of interest but defense counsel did not disclose the conflict and the court had no independent reason to know of it, the court is not on notice and has no duty to inquire. *See Cuyler v. Sullivan*, 446 U.S. 335, 346-48 (1980). As the

Supreme Court put it, "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Id.* at 347 (footnote omitted). In order to establish that a conflict of interest "adversely affected counsel's performance," petitioner need only show "that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) (citing *Mannhalt v. Reed*, 847 F.2d 576, 583 (9th Cir.), *cert. denied*, 488 U.S. 908 (1988)); *see Lockhart v. Terhune*, 250 F.3d 26 1223, 1231 (9th Cir. 2001) (same); *United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996) (same); *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994) (reviewing court "must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conduct"). *But see Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001) (petitioner must demonstrate that conflict of interest "actually affected" the attorney's performance). This showing need not rise to the level of actual prejudice, as it must with an ineffective assistance claim based on counsel's incompetence. *Maiden v. Bunnell*, 35 F.3d 477,481 (9th Cir. 1994); *Miskinis*, 966 F.2d at 1268.

An adverse effect in the *Cuyler* sense "must be one that significantly worsens counsel's representation of the client before the court or in negotiations with the government." *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995). A conflict which causes problems of some sort in some facet of the attorney-client relationship (for example, by generating transient feelings of mistrust between attorney and client), but which ultimately has no significant impact on counsel's representation before the court or in negotiations with the government,

does not cause an adverse effect in the sense of *Cuyler*. *See id.* at 1535-36.

In support, Petitioner points to the trial court's threat of having counsel arrested if he did not appear. (Pet. Attach. at 18; Ex. B at 6.) However, the threat to hold counsel in contempt was made after the trial court granted a continuance on June 30, 2009, and was only to be imposed if counsel attended another court matter (as he had the day before, *see supra* at 11) when he had represented that he needed immediate rest. The trial court explicitly stated: "I wouldn't expect you to go to [another court] if we recess this case today. And if you did, I will clearly find you in contempt of this Court because that's just," (Ans. Ex. B at 502); "Go where you need to go [i.e., the hospital] . . . You're not going to be held in contempt. It's going to another court when you say you have illnesses, that's what disturbs me," (*id.* at 504). It was not unreasonable for the trial court to be skeptical of counsel's representations that he could not proceed with the trial because of his back pain when he was still able to pursue other court matters.

Even if counsel was experiencing a conflict, this claim is without merit because Petitioner fails to show that counsel's performance was adversely affected. *Alberni*, 458 F.3d at 870; *Bragg*, 242 F.3d at 1087. In denying Petitioner's claim that the trial court had erred in denying counsel's motion for a continuance based on his back injury, the state appellate court found that the record substantiated the trial court's determination that counsel was not incapacitated, but rather fully able to proceed with the trial. *See supra* at 15. Petitioner has failed to rebut the presumption of correctness as to this factual issue by clear and convincing evidence. 28

U.S.C. § 2254(e)(1). Counsel's averments to the contrary are not persuasive in light of the trial court's personal observations of counsel's behavior in-court and beyond, i.e., he continued to walk and move about during and after trial and he attended other court matters. There is no indication that counsel's representation of Petitioner worsened after his initial complaints of back pain, and the trial court's observation that counsel was performing well indicates that there was no significant impact on counsel's representation before the court. *Mett*, 65 F.3d at 1535-36. Accordingly, the state court's rejection of this claim did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim. For reasons discussed below, Petitioner shall be granted a certificate of appealability on this issue.

CONCLUSION

For the reasons set forth above, the petition for writ of habeas corpus is DENIED.

The federal rules governing habeas cases brought by state prisoners require a district court that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. Petitioner has "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and reasonable jurists would find debatable the district court's assessment of Petitioner's claims that his right to effective assistance of counsel was violated due to counsel's failure to object to suggestive identification procedures (claim 7) and a conflict of interest (claim 8). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Accordingly, a certificate of appealability is **GRANTED** on those two claims. The certificate of appealability is **DENIED** as to all the other claims in the petition. Petitioner is cautioned that the Court's ruling on the certificate of appealability does not relieve him of the obligation to file a timely notice of appeal if he wishes to appeal.

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: February 5, 2015

BETH LABSON FREEMAN
United States District Judge

FILED 7/21/11

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
NICHOLAS BEAUDREAUX,
Defendant and Appellant./

A126140

(Alameda County Super. Ct. No. 60022

)m a judgment
/ of first degree
empted second
th offenses, the
that defendant
a firearm and
; great bodily
?2.5, subd. (a);
murder offense,
allegation that
ly discharged a

ıe Penal Code.

firearm inflicting great bodily injury causing death in violation of sections 12022.7, subdivision (a) and 12022.53, subdivision (d). Defendant contends that the trial court abused its discretion in refusing to great defense counsel a mid-trial continuance, and that the trial court erred in denying the motion for a new trial based on ineffective assistance of counsel and newly discovered evidence. We affirm.

I. FACTS

On the evening of September 3, 2006, Aluma Raymond Nkele went out for drinks with his friends, Wayne Drummond, Dayo Esho and Shandon Massey at Kip's on Durant Avenue in Berkeley.[2] After drinking a couple of pitchers of beer, the group left and walked up to Telegraph Avenue. They saw a large crowd in front of Blakes, a bar on Telegraph, and proceeded to walk in that direction. Nkele ran into his friend, Marquel, on the corner of Durant and Telegraph and stopped to talk with him.

Esho saw Crowder and greeted him, but Crowder did not reciprocate and instead tapped defendant who was with him and said, "That's him. That's him," pointing. Drummond was in the group behind Esho. Crowder and Drummond then started to argue angrily. Nkele and Massey also heard the argument ensuing between Drummond and Brandon Crowder, who was also one of Nkele's friends.[3] Nkele could hear that Drummond was upset but he could not hear what Drummond and Crowder were arguing

---

[2] Nkele and Esho were 2005 graduates of the University of California, Berkeley (UCB); Massey graduated from UCB in 2004. Drummond attended community college.

[3] Nkele found Crowder to be a bit immature so Nkele was a "big brother" to him and tried to mentor him by having him associate with his friends.

about. Massey testified that he heard Drummond and Crowder agree to settle their argument around the corner.

Esho tried to break up the fight. But Drummond and Crowder continued to argue and walked around the corner up Durant Avenue. Esho followed them and defendant was behind him. Massey was following the group behind Esho. Esho heard defendant say, "I don't know how to fight, but I know how to use this metal." Escho continued to try to physically break up Drummond and Crowder. A crowd of people followed them.

Drummond and Crowder eventually stopped and faced each other on Durant Avenue and continued arguing. At some point, Drummond pointed to Crowder and said, "I'll fuck you up, I'll fuck you up." He also said the same thing to defendant and a third unidentified male that was with them. Massey testified that he heard Drummond say, "I'll fuck you up" and "I don't care. I'll fight anybody." Crowder then said, "Yo somebody handle this," and moved to the left. Defendant then walked up to Drummond, pointed a gun at his neck, and aggressively said, "You need to give me your wallet right now." Massey told police that he heard the gunman say, "Give me your wallet or break yourself." Drummond grabbed the barrel of the gun and tried to wrestle it away from defendant. As Drummond pushed the gun away to his right and started to run, defendant pulled the trigger. Drummond ran up Durant. Esho heard a gunshot. He testified that the gun had been pointed at the area between Drummond's hip and stomach. Defendant followed Drummond up Durant but stopped when Esho approached him. Esho told him to "leave us alone." Defendant said, "He tried to grab my pistol." Defendant turned and walked back down

Durant towards Telegraph while Esho went to find Drummond.

Esho found Drummond on Bowditch, just a few feet from Durant. He was rolling around on the ground. Esho tried to see if he had been shot. He checked his shirt where he thought Drummond had been shot but saw no blood or any signs of a bullet wound. A young man was near Drummond and told Esho that he had seen him fall pretty hard and did not think he had been shot. The man was not part of Esho's group of friends. Esho tried to talk with Drummond, but he was moaning and looked like someone who had had too much to drink.

Nkele also heard the gunshot and followed the crowd at a brisk pace and heard a pop. He did not see a gun or the shooter. The crowd dispersed. Nkele ran up Durant Avenue in search of Drummond. Massey also followed Drummond and found his wallet on the sidewalk near the area of the gunshot and picked it up. When he got to Bowditch, he saw Drummond on the ground. Esho and Massey, and another man were also there.

Nkele checked on Drummond and thought he was very drunk. His speech was slurred and he did not look good. Nkele spoke with Esho and knew someone had brandished a gun. Nkele and Massey checked Drummond for injuries, but did not see anything. Drummond was wearing a white shirt and there was no blood on it.

Nkele went to meet Crowder who was around the corner of Durant and got into Crowder's car. They had a brief conversation. Crowder apologized and told Nkele, "I'm sorry it happened like that. But, you know, you mess with me, that's what you get." Nkele told Crowder to stay away from Drummond. "Wayne

doesn't exist to you from now on. Okay. You see each other, no eye contact. Don't say anything at all. Just keep walking." Nkele had no idea that Drummond had been shot. He got out of the car and Crowder drover away.

Nkele returned to Drummond and found him in the same condition. Drummond asked for water. He was not able to stand, and was slurring his words. Esho left to get water. He drove to the Chevron statin at Telegraph and Ashby and bought two bottles of water. There, he saw Crowder's van drive away from the station. A surveillance tape from Chevron showed Esho's car and Crowder's van at the station and Esho at the window of the minimart there. Esho left the Chevron station at 1:54 a.m.

Esho returned to Drummond and tried to give him water, Drummond was not able to drink it. Officer Elgin McIntosh, who was on routine patrol, noticed a man on the ground and stopped to determine whether he needed medical assistance at approximately 2:00 a.m. Drummond appeared to be intoxicated; he was somewhat responsive, he had vomited, and his speech was slurred. McIntosh did not observe any injuries or blood on Drummond. Although McIntosh asked Esho and the others present what had happened, no one mentioned the shooting. Nkele testified that "at that point, I'm thinking. . . honestly and truthfully. . . we're going to sleep this off. I'm going to take him to a bed, we're going to sleep this off and deal with all this in the morning." Massey did not want to deal with the police, and Drummond had said he wanted to go home. Esho, Nkele, and Massey placed Drummond in Esho's car and took him to a sorority on 2311 Prospect Street, where Nkele was staying. Once he was in Nkele's room, Esho that Drummond was

bleeding from the nose and nonresponsive. Esho called 911.

Emergency personnel responded to Esho's call but were unable to save Drummond. Drummond died from a gunshot wound to the right hip, penetrating his pelvis, fracturing his pelvic bone, and hitting a major blood vessel. He suffered substantial internal bleeding and went into shock. He had gunshot residue on his hands. It is impossible to determine whether Drummond would have survived the injury had he received prompt medical attention.

On the afternoon of September 4, 2006, Esho, Massey, and Nkele identified Crowder as the person who had argued with Drummond early that morning.

The police interviewed Crowder in September 2006 and learned that Crowder had gone to school with the person who shot Drummond.

In 2008, the police learned that Crowder was involved in a criminal threats case. Crowder turned himself in to the Berkeley police department on February 13, 2008 on threats warrant. Crowder waived his *Miranda*[4] rights and eventually identified defendant's photograph from a middle school yearbook as Drummond's shooter. He then identified defendant from a photographic lineup.

On February 19, 2008, the police transported Crowder and defendant in a van from the Berkeley jail to the North County jail for court. The van had a tape recorder and during the drive defendant made various comments to Crowder including, "You think it's hard now? Shit's about to get real out here. . . . Respect my gangster. . . . No turning back."

---

[4] *Miranda v. Arizona* (1966) 384 U.S 436.

Defendant also told Crowder, "You just better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again." And defendant said, "Man, fuck this. . . timing man. If you would have kept your mouth shut, we wouldn't be in this shit. You just don't know where everything is."

On February 14, 2008, Esho identified defendant as possibly being the shooter in two photographic lineups. Esho identified defendant as the shooter at both the preliminary hearing and at trial. Massey was not absolutely sure that defendant was the shooter.

Crowder was initially a codefendant with defendant at trial. After the jury was selected, however, Crowder entered into a plea agreement with the prosecution under which he agreed to testify against defendant. Crowder testified that he entered into a written plea agreement under which he agreed to plead no contest to a charge of voluntary manslaughter, with the understanding that he would testify truthfully in the case and in exchange he would be sentenced to time served.

Crowder testified that he suffered a misdemeanor conviction for possession of stolen property in 2005. In September 2006, he was 19 years old and living in Berkeley. He had known defendant since middle school. He met Drummond through a friend at a party in 2005. Drummond was friends with Nkele, who was also one of Crowder's friends. Drummond was a mentor to Crowder in 2006, but at some point, they were no longer getting along. Crowder grew annoyed with him. He told others that he wanted to "get" him or "stomp" him.

On September 3, 2006, Crowder drove to Blakes with some friends and smoked some marijuana. At Blakes, Crowder shared some marijuana with defendant. At about 1:30 a.m., he left Blakes and saw defendant hanging around with some people. He shook defendant's hand, and defendant said, "I'll see you next time."

Esho then approached Crowder and greeted him, but Crowder focused on Drummond who was behind Esho. Crowder and Drummond started to talk "trash" to each other. They began to argue and agreed to fight. Crowder testified, "I was fed up with all the name calling, and I was just kind of excited." They walked up Telegraph and then turned right on Durant. Esho, defendant, and others followed them "to see a fight." He could hear defendant talking but he did not remember what he said. At some point, they stopped walking, faced each other, and continued the name calling. They called each other "bitch" and were pushing each other. Esho was trying to break them up. Drummond pointed to Crowder and said, "I'll fuck you up"; he also pointed to defendant and said the same thing. Crowder stepped back. Defendant broke through the crowd, pulled out a gun, and pointed it at Drummond's neck. Defendant told Drummond, "You need to give me your money right now." Drummond wrestled with defendant for the gun and then a shot went off. Drummond jumped back and then ran up Durant. Crowder did not think that Drummond had been shot. After meeting up with Nkele, Crowder drove to the Chevron station to meet with Trevina, a female friend. Crowder positively identified defendant as the shooter.

II. DISCUSSION

1. Motion for Continuance

Defendant contends that the trial court abused its discretion and denied him due process when it denied defense counsel's request for a continuance to address his back pain.

a. Factual Background

On June 15, 2009, during the prosecution's case, the court recessed the trial until June 29, 2009 because it was going to be covering another judge's calendar the following week. On Monday, June 29, 2009, defense counsel informed the court that he had gone to the emergency room at Highland Hospital on Saturday, June 26, 2009 because of intolerable back pain. Dr. Nagdev gave him a prescription for Vicodin and said that his symptoms were consistent with radiculopathy or a compressed nerve. Defense counsel represented that he was told he could return to work in five days. He also told the could he did not feel able to function, he could feel the effects of the Vicodin, and he was in significant pain. Defense counsel said, "the analogy I would use. . . if I were an airplane pilot, I don't think I'd be flying a plane today. But it's obviously the Court's decision whether [to] proceed or not. I'd like to go home, but If I have to sit here and try this case, that's what I'm going to do." The prosecutor indicated that he had offered to help defense counsel with exhibits, recordings, and other matters so that defense counsel could remain seated during questioning and examination and that he anticipated resting the case on Wednesday. Finally, the prosecutor said that it was "the People's position that we go forward, and if at some point during the day it becomes unbearable for Mr. Kelvin, perhaps he can let us know. In other

words, to go forward with what we have now." The court stated, "I don't care what the People's position is, quite frankly. [¶] Here's the issue. Mr. Kelvin, you've indicated you've had this. I have back pain every day. And I think I told the lawyers, every day I do 20 minutes of stretching. It's been since 2003 where I saw an orthopedist, and I continue to do this because it's part of the routine. We all have, as we age, we get these back issues. I was reading a book right now regarding somebody and [his] back. [¶] I do have this emergency [form]—from an emergency doctor at Highland who says, '[r]estrictions, no work requiring repetitive bending.' And I do have Mr. Kelvin saying that he's had this back pain for a while, but he went in on Saturday and he's taking this medication. Just knowing the back, knowing what I go through, and I'm not discounting anything you say regarding this, because it talks about a possible sprain of the back and it tells you it could reappear or it couldn't, when it says about—in this little information you gave me, Mr. Kelvin. [¶] Are you seeing an orthopedist, Mr. Kelvin? [¶] [MR. KELVIN]: I don't know what qualifications Dr. Nagdev had. He [was just] an emergency room doctor. . . . I'm supposed to be arranged for an MRI today, but obviously if I'm here— [¶] [THE COURT] It sort of seems to me—well, like I said, "I've seen an orthopedist, and they didn't do an MRI off the top. They just don't do it, not a specialist in this area. I'm not certain whey they haven't referred you to an orthopedist, because it's a back. It's not an emergency room specialist. They don't have the expertise to deal with backs. And like I said, this is something that we have. This is what we just live with. [¶] My inclination was that—and before even Mr. Wellman [deputy district attorney] made his statement, my inclination is to move forward today,

because you're going to have this back pain. There's not too much I can do about it, and I don't think there's much you can do about it. It's a think that's going to be a whole process for the rest of your life. We would take—my thought is we're going to take breaks a little more frequently than we do, that you can cross-examine from the bench, Mr. Kelvin, if you don't feel you can stand up and do it. [¶] What it's saying here is you shouldn't be bending. Doesn't say you shouldn't be standing. Actually, standing is probably better, but I don't know. I'm not certain what—I can't read into this or what the doctor is saying. That's what my thoughts are. [¶] [MR. KELVIN]: The only other comment I would have, I have a number of materials relating [to] this case in the car, which I didn't carry in the court because it was kind of hard to carry them. But I'll just limp back and get them if I can get them in. [¶] [THE COURT]: No. Mr. Payne will get them for you, from the DA's office. [¶] [MR. KELVIN]: He doesn't know where they are. [¶] [THE COURT]: He'll go with you, and he's going to carry them back for you. [¶] [MR. KELVIN]: Okay. Then I'll have a helper. [¶] [THE COURT]: That's my thought. And we are going to be off—assuming that Mr. Wellman finishes, I would have us off after Wednesday. You wouldn't come in on Thursday. [¶] And I'm not certain what you are going to do with your case, Mr. Kelvin. If you are going to call witnesses, we would start on Monday with the witnesses. And if not, we'll start—we'll also do instructions and prepare for argument." Defense counsel then expressed concern that the prosecution intended to call Crowder that day so he needed to go get the recorded statements. The court then deferred Crowder's examination until after the prosecution completed several other witnesses. Hence, the court's minutes reflect that trial was in

session for approximately four hours,[5] with the court taking three recesses during that period.[6]

On June 30, 2009, defense counsel again asked for a continuance. The following colloquy occurred: [MR. KELVIN]: "Yesterday I raised an issue concerning my ability to perform in this case based on health factors. I have to tell you today I feel worse than I did yesterday. It took me half an hour to walk from my car to here, which is a block and a half away. I don't feel that Mr. Beaudreaux has an attorney in the meaningful sense of the word. My back hurts real bad and I should be either getting my MRI in line now. And having said that, I know the Court's position. But yesterday I was working all day and I don't know. I'm just a layperson, but to me it exacerbated the situation. I'm in bad pain and I was unable to concentrate on what Mr. Crowder was saying yesterday. He's the most critical witness in the case. I don't know what anybody is supposed to do about it. I know Mr. Wellman wants to finish the trial. [¶] [THE COURT]: Finishing the trial has nothing to do with it. Mr. Kelvin, yesterday you went through some of these witnesses who were probably

---

[5] In its preliminary instructions to the jury, the court informed it that the court would be in session from 9:00 a m to 1:30 p.m. with recesses in between on Mondays through Thursdays and that court was not in session on Fridays.

[6] The court's minutes show that questioning of witnesses began at 9:20 a.m , a recess was taken at 10:02 a m , and questioning resumed at 10:30 a.m Trial was again recessed at 11:36 a.m., and at 11:53 a m., court and counsel discussed matters outside the presence of the jury. The court recessed again for four minutes and then resumed trial at 11:59 a.m. At 12:25 p.m., the People called and began the examination of Crowder. At 1:19 p.m , the court ordered the jury to return the following morning. The court then discussed a couple of notes from jurors before adjourning at 1:24 p m.

two-minute witnesses, you spent 15 minutes on cross-examination. To the extent you had the inability to perform as a lawyer, I didn't see it. In fact, I was amazed with the amount of time that you spent and the issues that you took up with some of these witnesses. So to that extent, you perform well and beyond anybody I've seen in any courtroom as it relates to cross-examining and dealing with issues with witnesses. [¶] Yesterday after everybody left you were here for another 15 minutes. You were walking around, you were doing something with the video. I understand if, yes, you may have some back pain. I had back pain this morning, as I say every day. I have sciatica. I feel the numbness in my legs. I'm here. [¶] You have done, in terms of performing as counsel, I'm just not certain what the real issues are. To the contrary, your performance is totally contrary to the state of condition that you indicated that you were in yesterday. [¶] [MR. KELVIN]: Well, Judge. [¶] [THE COURT]: And I did take several recesses yesterday, including one which was a half an hour long, which is definitely longer than ever that we take a recess in this department. [¶] [MR. KELVIN]: Judge, I'm not going to sit here and not try to do the best I can, but my best at the moment is not much. I just feel that my client's interests are being prejudiced. I did stay yesterday after the jury left because I was trying to get my computer to display the recorded interview of Mr. Crowder. It works on the computer, but on the screen on the wall there's a signal saying that it's not right. I have an attorney, Mr. Andrew Kapur, who is very technically skilled, and I was going to set it up before we went on the record this morning so my computer would work. Mr. Wellman say, well, his computer is plugged in and he didn't want to unplug his so I can plug mine in. I'm still not in a position to

display the interview of Mr. Crowder, which I wanted to do. That's a whole different issue. [¶] If the Court thinks I'm malingering or I'm just trying to make an excuse to delay the thing, that's an assessment the Court has to make. I'm telling you, I'm in pain. I'm not able to do my job. And if the Court is ordering me to proceed, that what I'm going to do, but I'm just not—I should be lying down. [¶] [THE COURT]: What did you do after you left here yesterday, Mr. Kelvin? [¶] [MR. KELVIN]: I went to one other court and went home about 4:00 o'clock and I laid down until the morning. [¶] [THE COURT]: Why did you go to another court if you were in such a condition? Why didn't you call that court or have my clerk call that court? I don't understand that. [¶] [MR. KELVIN]: Because that court is your Judge Bean's court and I delayed it last week and I promised her I'd be there yesterday. [¶] [THE COURT]: You mean you drove all the way down to Hayward from here yesterday? [¶] [MR. KELVIN]: Yes, I did. I felt like I'd already delayed her case one time and I don't like to be unreliable. In fact, I met in the hallway in Hayward an attorney Mike Wohlstadter, who you know well, and he came up to me unsolicited and said, "Mr. Kelvin, you look terrible. You look like you're in bad pain. Your eyes are sunk in your head." This is a guy who I didn't ask him to come up and tell me this. [¶] [THE COURT]: Mr. Kelvin, you went down to Hayward for a misdemeanor, and you could have had this Court call down there? [¶] [MR. KELVIN]: You know, Judge, those are the facts. I'm not going to sit here and lie about them. I've been in my bed since 4:00 o'clock yesterday afternoon. And I got up this morning and I felt worse than I did yesterday. That's just—those are the facts as I'm aware of them. If the Court's position is I have to proceed with the trial,

then that's what I'm going to do. I'm not able to do the things that I need to be doing. I can't concentrate. All I can think about is how bad my back hurts and that's the situation. . . ." The court then recessed for a minute and when trial resumed, asked defense counsel if he had taken any medication. Defense counsel responded that he was taking Vicodin and had last taken one at 5:00 a.m. He also informed the court that he had taken one at 4:00 p.m. and at 8:00 p.m. the previous day. Counsel reiterated that he could not do what was required of him, that his back hurt "pretty bad" and described his pain level as worse than the "seven or eight" it had been on Saturday. The court then continued the matter to the following day. But before the court could adjourn for the day, defense counsel requested some time to discuss jury instructions and to work with a computer technician to set up a video. The court became exasperated with counsel, telling him, "I can't believe I'm having this discussion where you say you have to be home, you need to be resting and you're talking about doing this computer. I can't believe I'm having this discussion. [¶] Go ahead, Mr. Kelvin. I expect you here tomorrow morning to be prepared."

The following day, July 1, 2009, defense counsel presented the court with a note from Highland, stating he was to be off work until July 6. Counsel stated, "I understand that that can't happen, but just want to say for the record I feel today like I felt yesterday, which is not good. I would ask that this be placed in the file. It's a letter from Alameda County Medical Center regarding the state of my health." The court asked counsel about his state of mind. Defense counsel responded, "It's pretty much like it was yesterday. I'm in a lot of pain, but I don't want all these people sitting here and waiting for me. I

feel bad about it. So I'll proceed." The following discussion ensured: [¶] [THE COURT]: "There is threshold of pain. As I said to you, I'm in pain today, and I've been that way for six years. That is just something I deal with. And sometimes it's worse than on other days. That's just what I deal with. I mean, to that extent that's what I'm asking you. Yes, you are in pain? [¶] MR. KELVIN]: Yes. And I understand that we have to make sacrifices. All I can say is as long as I'm lying down in a bed, you know, taking medication with a heating pad under me, I'm fine. But when I get up and start walking around, it's fairly painful. So getting in the courtroom today was a process. But hopefully as long as I'm—I'm planted in a chair and I'm going to go ahead. [¶] [THE COURT]: Let's keep you in the chair. I don't have any reason for you to stand up," Defense counsel indicated that Andrew Kapur, an attorney that he works with, would be assisting him to play some recorded statements of Crowder, and the prosecutor also expressed his willingness to assist defense counsel with exhibits.

Trial then proceeded at 9:08 a.m. with the completion of the direct and cross-examination of Crowder, and the examination of Michelle Dilbeck, an expert in the field of firearms examination, Ann Keeler, an expert in the field of gunshot residue, and police officer Todd Sabins. The court's minutes reflect that the court took three recesses ranging in time from 16 minutes to 23 minutes, with the court adjourning for the day at 1:29 p.m.

Prior to adjourning, the court remarked, "I want to say for the record, having observed Mr. Kelvin today, he's had an incredibly extensive cross-examination of each of the witnesses. He has performed as he generally does. He has moved

slowly, but he's been up and down, and he's approached the witness, he's looked at exhibits, and I just want to make sure the record is clear as it relates to that activity and the fact that his—it doesn't appear that anything suffered in terms of his abilities here, because he's clearly the David Kelvin that I know in the courthouse." Defense counsel responded that he was in some pain and distress but was trying to do the best he could

Trial resumed on July 6, 2009, without any request by defense counsel for a continuance or accommodation for his back problem. The prosecution and defense both rested their cases.

On Monday, July 6, 2009, trial resumed with the court commencing jury instructions. The court declared a brief recess almost immediately as one of the jurors felt ill and needed a five minute break. Defense counsel informed the court that he was not feeling well and then proceeded to discuss a jury instruction issue. In the midst of that discussion, defense counsel implied that he would have given the court case authorities earlier but "I can't even walk. I can't get out of my car. It took me a half an hour to walk two blocks, and I'm doing the best I can. I apologize." In response, the court remarked that he appreciated that defense counsel was making his record. The parties proceeded to discuss jury instructions, followed by the court's instructions to the jury, and closing arguments and the court's final instructions to the jury. The jury retired for deliberations. In noting his availability for the following day, defense counsel noted that he had a motion in Department 115 and a trial in Department 130.

b. Analysis

The trial court has broad discretion in determining whether good cause exists to grant a continuance of trial. (§ 1050, subd. (e).) "'The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 972, quoting *People v. Laursen* (1972) 8 Cal.3 192, 204.) "In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126.) Defendant bears the burden of demonstrating that the court's denial of a continuance was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

While we do not condone the trial court's interjection of its own back pain threshold into its analysis of defense counsel's pain issue, our review of the record convinces us that the court did not abuse its discretion. First it is unclear from the record whether defense counsel's emergency room doctor ordered that he not return to work for five days. The doctor's note that counsel provided to the court indicated simply that he was restricted from work that required positive repetitive bending.[7] Second, although defense counsel claimed to be both in

---

[7] The note from the emergency room physician is not in the record

significant pain and under the influence of Vicodin, the record reflects that he nevertheless proceeded to cross-examine several prosecution witnesses and appeared to be engaged in the trial. The court took two recesses, of 17 and 28 minutes, in the four-hour long court day, and a third recess of four minutes. Defense counsel did not indicate at any time during that court day that he was unable to proceed, and the court later remarked on counsel's thorough cross-examination.

When defense counsel informed the court the following day that he was still in significant pain, the court recessed for the day. The court, however, noted for the record that counsel had not left the court immediately upon adjournment the previous day but had spent another 15 minutes working with the video equipment. The court was also chagrined to learn that defense counsel had driven to another court in Hayward that afternoon rather than resting.[8]

Finally, when trial resumed on July 1, 2009, defense counsel, although giving the court a note from Highland Hospital stating he should be off work until July 6,[9] and informing the court that he was still in pain, did not request a continuance but told the court that he would proceed with the trial. Again, the record reflects that counsel performed diligently in cross-examining witnesses and engaging in discussions with the prosecutor and the court. The

---

[8] Although the court continued the matter for a day, it did so only after reminding defense counsel that he was not to go to other courts that day: "Mr. Kelvin, here's what I'm telling you right now: If I'm going to continue and delay this case because you have this back pain and you say that you can go down and make an appearance at another court, I'm questioning your representation."

[9] The letter is not part of the record.

record further reflects that counsel complained a final time about pain on July 6, 2009 during a discussion on jury instructions but notably did not request a continuance but rather proceeded to argue about jury instructions. In addition, when the jury retired for deliberations, counsel informed the court of his scheduled appearances in other court rooms for the following day, one of which included a trial.

In sum, the record demonstrates that defense counsel, despite complaints of back pain and sporadic requests for continuances, proceeded to provide defendant with effective representation. Even if we were to conclude that the court abused its discretion in denying counsel's initial request for a continuance, there is simply no showing that defendant was prejudiced.

People v. Crodedi (1966) 65 Cal.2d 199, 201, cited by defendant, is inapposite. That case involved the issue of defendant's right to counsel of choice. There, the defendant's attorney suffered a heart attack after the first four days of trial. The court continued the matter for two weeks and then denied defendant's request for a continuance even though his attorney's law partner presented medical documentation that defendant's counsel would not be able to resume the trial until seven weeks later. (*Id.* at pp. 201-202.) Instead, over the defendant's and the law partner's objections, the court appointed the law partner to represent defendant, allowing him only one week to prepare for trial. (*Id.* at p. 203.) Our Supreme Court held that the trial court's refusal to permit the defendant to be represented by his counsel of choice constituted a denial of due process. (*Id.* at p. 208.)[10]

---

[10] *People v. Panah* (2005) 35 Cal.4th 395 (*Panah*), cited by defendant, is also of no assistance to him. That case, like (continued...)

Here, by contrast, defense counsel appeared in court and although he complained of pain, he continued to afford defendant effective representation. "[W]here defense counsel present in court requests a continuance on the grounds of illness, a factual issue is presented for the trial court as to whether the attorney's condition precludes him from effectively proceeding with his defense [citations]." (*People v. Augustin* (1968) 265 Cal.App.2d 317, 329.) The trial court, based on its discussions with and observation of defense counsel in court, determined that counsel was not incapacitated and that he was fully able to proceed with the trial. Our review of the record substantiates the trial court's observations. Not only did defense counsel provide defendant with adequate representation, he did so in the face of overwhelming evidence of Esho's and Crowder's eyewitness identifications of defendant as the shooter.

(...continued)
Crovedi, supra, involved an issue of choice of counsel. (*Panah, supra* at pp. 426-427.) While the defendant there requested a continuance to permit his secondary counsel to recover from a back injury, the court questioned the true reasons for the request, noting that defendant's primary counsel had already informed the court that his secondary counsel was not qualified to try the case and that he was making 97 percent of the decisions in the case. (*Id.* at pp. 423-424.) The court ultimately removed the secondary counsel and replaced him. (*Id.* at p. 426.) *Panah*, while concluding that the court did not abuse its discretion in denying a continuance, did not involve a situation where counsel is present in court and the court has the opportunity to observe counsel's abilities and physical appearance.

2. Effective Assistance of Counsel

Defendant contends that the trial court erred in denying his motion for a new trial in which he argued that he was denied the effective assistance of counsel.

In order to prove a claim of inadequate representation, a defendant must show that "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Effective and competent representation requires "counsel's diligence and active participation in the full and effective preparation of his client's case.' [Citation.]" (*Id.* at pp. 424-425.) We will reverse a conviction on the ground of inadequate counsel only if the defendant affirmatively shows that the omissions of defense counsel cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Zapien, supra*, 4 Cal.4th at p. 980.) The defendant must also establish prejudice from counsel's acts or omissions. Ordinarily prejudice must be affirmatively proved; the defendant must establish the reasonable probability that had counsel not been incompetent, the proceeding would have had a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

In his motion for a new trial, defendant alleged that his counsel's back pain prevented him from providing effective representation. In particular, defense counsel's declaration submitted in support of the motion averred that due to his back pain, his "contact visits with defendant [] during trial were infrequent and brief" and that he was unable to devote any time outside of court to meet with him and prepare him to testify. He further declared that a recent MRI showed that he had bulging discs at L4-

L5 and L5-S1, impinging on a nerve and that he was awaiting corrective surgery.

The trial court properly denied the motion. "[T]he trial court is in the best position to make an initial determination, and intelligently evaluate whether counsel's acts or omissions were those of a reasonably competent attorney." (*People v. Jones* (1981) 123 Cal.App.3d 83, 89.) This was not defense counsel's first case before the trial court; the court was familiar with defense counsel, and acknowledged that he tried this case in accordance with his usual standards, noting that his "performance [was] totally contrary to the state of condition that you indicated that you were in. . . ." The court further commented that defense counsel "performed as he generally does. He has moved slowly, but he's been up and down, and he's approached the witness, he's looked at exhibits ... and the fact that his—it doesn't appear that anything suffered in terms of his abilities here, because he's clearly the David Kelvin that I know in the courthouse."

The record reflects that defense counsel informed the court that he did not intend to call defendant to testify. At no point did defense counsel subsequently tell the court that he changed his mind on that issue or that he needed additional time to prepare defendant to testify. The defense theory was that Crowder was lying and defense counsel sought both in his cross-examination and in closing argument to discredit Crowder and the other prosecution witnesses. We cannot second guess defense counsel's strategy. While in hindsight he claimed that defendant would have testified, defendant's testimony would have been problematic as he had made pretrial incriminatory statements and had suffered a prior conviction involving gun use.

Moreover, our review of the record persuades us that defendant was not prejudiced by his counsel's decision. In view of the eyewitness testimony that defendant was the shooter, it is not reasonably probably that defendant would have received a more favorable verdict. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

Defendant also argues that the court should have granted a new trial based on newly discovered evidence. In support of his motion for a new trial, defendant submitted the declarations of two friends, Elisha Nelson and Amber Hill. Nelson declared that she was a friend of Ronald Benjamin, who was now deceased. She stated that Benjamin told her at her birthday party on September 4, 2006 that he had shot someone earlier in the day. He asked her to keep the information to herself but when she heard of defendant's conviction, she got in contact with defendant's counsel. Hill, in turn, averred that she was friends with both defendant and Benjamin and that she was at the scene of the shooting. She was with defendant when the fight broke out between two men outside Blakes. She and defendant followed a crowd of people around the corner. The smaller of the two men fighting challenged people in the crowd, including Benjamin, and swore at them. She heard a gunshot and declared that defendant did not have a weapon in his hand and did not fire any shot, but that the sound of the gun came from where Benjamin was standing.

"A defendant on a motion for a new trial based on newly discovered evidence must show . . . that the evidence is in fact newly discovered; that it is not merely cumulative to other evidence bearing on the factual issue; that it must be such as to render a different result probable on a retrial; and that the

moving party could not, with reasonable diligence, have discovered and produced the evidence at trial." (*People v. McDaniel* (1976) 16 Cal.3d 156, 178.)

Here, defendant failed to show that the evidence was newly discovered or that is could not have been discovered and presented at trial. As the trial court remarked prior to denying the motion: "I find it fascinating that Ms. Nelson visited Mr. Beaudreaux 21 times in the Santa Rita Jail. The 21 times in all this interaction, there's never been any information that the lawyers derive from her or Mr. Beaudreaux that she was a witness and could corroborate certain facts and circumstances in this case. . . . I don't know if it's coincidental that Mr. Benjamin, who is dead, is said to have said that before he died sometime that he shot somebody off around the corner from Telegraph. It it's coincidental or not, I don't know." Indeed, the record reflects that Nelson visited defendant 21 times between May 16, 2008 and March 22, 2009, well before trial commenced. On these facts, her declaration that she acceded to Benjamin's request to keep his information confidential, and felt compelled to reveal it only after hearing of defendant's conviction lacks credibility. In addition, as the court noted, Nelson's declaration does not state that Benjamin shot Drummond, only that he shot "someone." Finally, defendant failed to show that Hill's declaration was newly discovered. Her declaration was also questionable. As an eyewitness at the scene of the crime, and a friend of defendant's, the timing of her statement alone was cause for suspicion. Moreover, she did not aver that Benjamin was the shooter, just that the sound of the gunshot came from where he was standing.

The trial court justifiably denied the new trial motion based on this evidence, and based on the

absence of any showing that this evidence could not have been discovered and produced at trial.[11]

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

REARDON, Acting P.J.

SEPULVEDA, J.

A126140 *People v. Beaudreaux*

[11] By separate order today, we deny defendant's petition for a writ of habeas corpus.

Court of Appeal First Appellate District
FILED JUL 22 2011
Diana Herbert, Clerk
By _____Deputy Clerk

COURT OF APPEAL
FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 4

In re NICHOLAS BEAUDREAUX on Habeas Corpus.

A130110
Alameda County No. 160022

BY THE COURT:

The petition for writ of habeas corpus is denied.

Date: JUL 22 2011 REARDON, ACTING P.J.

Court of Appeal, First Appellate District
Division Four – No. A130110

S195827

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re NICHOLAS BEAUDREAUX
on Habeas Corpus.

The petition for review is denied.

SUPREME COURT
FILED
OCT 12 2011
Frederick K. Ohlrich Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice

Court of Appeal, First Appellate Disrict,
Division Four – No. A126140

S195831

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,
v.
NICHOLAS BEAUDREAUX, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED
OCT 12 2011
Frederick K. Ohlrich Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice

FILED JAN 10 2013
Court of Appeal – First App. District
DIANA HERBERT
By_____
DEPUTY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re NICHOLAS BEAUDREAUX, on Habeas Corpus.
_____/

A137478

(Alameda County Super. Ct. No. 160022

THE COURT:

The petition for writ of habeas corpus is denied.

(Ruvolo, P.J., Reardon, J., and Rivera, J., joined in the decision.)

Date: JAN 10 2013 Ruvolo, P.J.

Court of Appeal, First Appellate Disrict,
Division Four – No. A137478

S208146

IN THE SUPREME COURT OF CALIFORNIA

En Banc

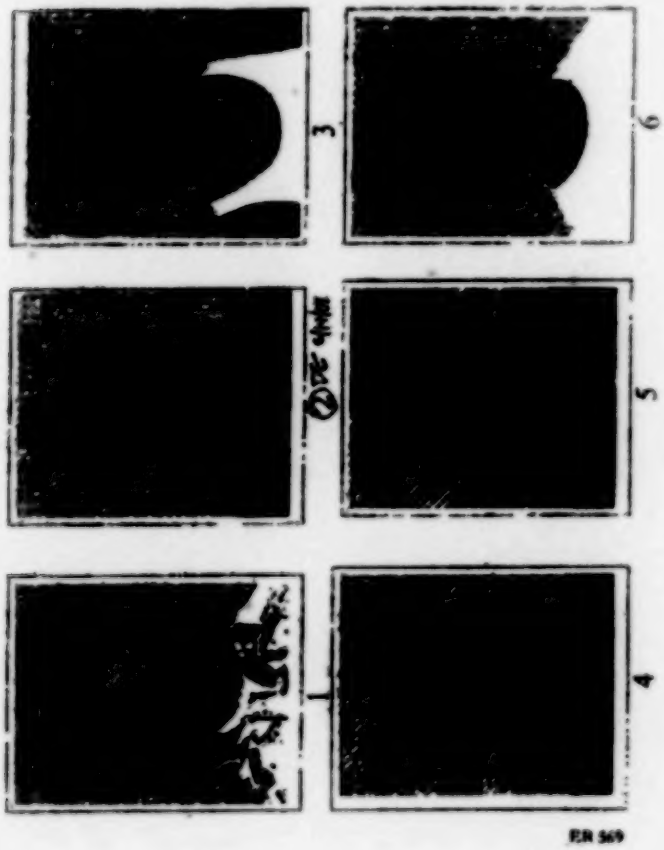
In re NICHOLAS BEAUDREAUX, on Habeas Corpus.

The petition for review is denied.

SUPREME COURT
FILED
MARCH 27 2013
Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice


3
6
5
1
4

NO. 17-1106

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL SEXTON,

Petitioner,

v.

NICHOLAS BEAUDREAUX,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Motion to Proceed In Forma Pauperis

Jamie Lee Moore
Attorney at Law/Counsel of Record
700 Larkspur Landing Circle, Suite 199
Larkspur, CA 94939
(415) 272-2772
fedappeal@yahoo.com
Attorney for Respondent
Nicholas Beaudreaux

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Pursuant to Rule 39 of the Rules of the Supreme Court of the United States, Respondent, Nicholas Beaudreaux, by undersigned counsel of record, respectfully requests leave to file his opposition to the petition for writ of certiorari *in forma pauperis* without payment of costs.

Undersigned counsel is appointed to represent Respondent in the Ninth Circuit Court of Appeals under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

Respondent seeks leave to proceed *in forma pauperis* because he is indigent and without sufficient funds to proceed in this Court.

Wherefore, Respondent respectfully prays that this motion be granted.

Dated: March 9, 2018

Respectfully submitted,

_____

Jamie Lee Moore
Counsel of Record for Respondent
Nicholas Beaudreaux

NO. 17-1106

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL SEXTON,

Petitioner,

v.

NICHOLAS BEAUDREAUX,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief for Respondent
In Opposition to Petition for Writ of Certiorari

Jamie Lee Moore
Attorney at Law/Counsel of Record
700 Larkspur Landing Circle, Suite 199
Larkspur, CA 94939
(415) 272-2772
fedappeal@yahoo.com
Attorney for Respondent
Nicholas Beaudreaux

Table of Contents

Table of contents 1

Table of authorities iv

Counterstatement of the case 1

A. The incident 1

1. Brandon Crowder and Wayne Drummond had an argument 1

2. A third man pointed a gun at Drummond and asked for his wallet; They struggled for the gun, it fired, and Drummond ran away 2

3. No one realized Drummond was shot until it was too late 3

B. The investigation 4

1. Nkele, Massey, and Esho identified Crowder but not the gunman 4

2. Crowder did not identify the gunman during four interviews 5

3. No physical evidence identified the gunman 5

4. Crowder threated to kill another man more than a year later 6

5. Crowder identified Beaudreaux after police threatened murder charges 6

6. No one corroborated Crowder's identification of Beaudreaux 7

C. Pretrial proceedings 9

1. Crowder and Beaudreaux were each charged with first-degree murder 9

2. Esho identified Beaudreaux when he saw he was Crowder's codefendant 9

3. Defense counsel complained of back pain 10

D. The trial 10

1. Crowder turned state's evidence after jury selection 10

2. Defense counsel was admitted to a hospital emergency room 10

3. Massey did not corroborate Crowder's identification of Beaudreaux 11

4. A recording attributed to Beaudreaux was admitted into evidence 11

5. Crowder identified Beaudreaux as the gunman 12

6. Counsel said he could not effectively represent Beaudreaux 13

7. Counsel's doctor directed him to stay off work 14

8. Crowder admitted he repeatedly lied to police and identified Beaudreaux only after police threatened to charge him with murder 15

9. The lineup procedure was unusual and a departure from training 16

10. Esho corroborated Crowder's identification although Beaudreaux did not match his initial description of the gunman and he did not identify him in two pretrial photo lineup arrays 16

11. Beaudreaux was convicted and sentenced to 50 years to life 17

E. The state courts affirmed the convictions and denied habeas relief 18

F. The federal district court affirmed, but the court of appeals reversed 18

Reasons to deny certiorari 19

A. The Circuit's decision will have little, if any, influence on other cases 19

B. The Circuit correctly stated and applied AEDPA deferential review 19

C. The Circuit correctly applied AEDPA review for the *Strickland* deficiency prong 20

1. There is no reasonable basis to conclude counsel's inaction was strategic 21

2. The Circuit's decision is not contrary to *Knowles v. Mirzayance* 23

3. There is no reasonable basis to conclude a motion to exclude Esho's identification as the product of suggestion would not succeed 23

D. The Circuit correctly applied AEDPA review to *Kimmelman's* requirement that a motion to exclude Esho's identification testimony must have merit to satisfy the *Strickland* deficiency prong, and found the motion had merit ... 24

1. All fair-minded jurists must agree Esho's identification was the product of impermissible suggestive pretrial police procedures under this Court's well-established authorities or a reasonable extension thereof 25

a. The first lineup procedure was more suggestive than in *Foster* 28

b. The second lineup procedure was more suggestive than in *Foster* 28

c. As in in *Foster*: The third time was a charm 30

2. Fair-minded jurists must agree Esho's identification was not independently reliable 31

a. Two years passed between the shooting and the identification 32

b. Esho's initial description did not match Beaudreaux 32

c. Esho was uncertain until after repeated exposure to Beaudreaux's face and until he saw Beaudreaux in court alongside his friend, Crowder, who had obviously identified Beaudreaux as the gunman 32

d. The Circuit deferred to the state courts when it found Esho had a good opportunity to view the gunman 34

e. The Circuit deferred to the state courts when it found Esho paid close attention 35

E. The Circuit correctly applied AEDPA review to the *Strickland* prejudice prong 35

1. Esho's identification was critical to the state's case 36

2. Massey did not corroborate the identification of Beaudreaux 37

3. The recording provides no objectively reasonable basis to infer consciousness of guilt 38

F. Summary disposition is inappropriate 40

Conclusion 40

Table of Contents

Constitutional amendments

U.S. Const. amend VI 18, 20

U.S. Const. amend. XIV 18

Federal cases

Cavazos v. Smith

565 U.S. 1 (2011) (per curiam) 40

Chapman v. California

386 U.S. 18 (1967) 26

Cullen v. Pinholster

563 U.S. 170 (2011) 20, 36

Felkner v. Jackson

394 U.S. 440 (1969) 40

Foster v. California

394 U.S. 440 (1969) ..... passim

Harrington v. Richter

562 U.S. 86 (2011) 19, 21, 36

Johnson v. Sublett

63 F.3d 926 (9th Cir. 1995) 31

Kimmelman v. Morrison

477 U.S. 365 (1986) 20, 21, 24, 25, 27, 31

Knowles v. Mirzayance

556 U.S. 111 (2009) 23

Manson v. Brathwaite

432 U.S. 98 (1977) 30

McDaniel v. Brown

558 U.S. 120 (2010) (per curiam) 40

Neil v. Biggers

409 U.S. 188 (1972) 24, 26, 31, 32

Parker v. Matthews

567 U.S. 37 (2012) (per curiam) 30-31

Simmons v. United States

390 U.S. 377 (1968) 24, 25, 27, 31

Strickland v. Washington

466 U.S. 668 (1984) ..... passim

United States v. Wade

388 U.S. 218 (1967) 30

Woods v. Donald

575 U.S. 1 (2015) 20

Yarborough v. Alvarado

541 U.S. 652 (2004) 19

Yarborough v. Gentry

540 U.S. 1 (2003) (per curiam) 40

Federal statutes

28 U.S.C. § 2254 ..... 18, 19

28 U.S.C. § 2254(d) 21

28 U.S.C. § 2254(d)(1) 19, 20, 36, 37

California cases

People v. Pedroza

231 Cal.App.4th 635 (2014) 22

California Penal Code

§ 187(a) 9

§ 211 9

§ 1111 ..... 22, 25, 37

§ 1203.075 9

§ 12022(a)(1) 9

§ 12022.5(a) 9

§ 12022.5(a) 9

§ 12022.7(a) 9

§ 12022.53(d) 9

COUNTERSTATEMENT OF THE CASE

A. The incident.

1. Brandon Crowder and Wayne Drummond had an argument.

Wayne Drummond, Raymond Nkele, Shandon Massey, and Dayo Esho were friends. ER 831-33. They tried to mentor Brandon Crowder, whom they met while playing basketball. ER 649-50, 857, 892, 962-65, 1013, 1065-67, 1148. After Crowder had a falling out with Drummond, he told people he would "get" or "stomp" Drummond, or "put him in a trunk." ER 717, 757-58, 891, 893-94, 967.

On September 3, 2006, Crowder went to Blake's Bar in Berkeley with friends. ER 725-27, 894-95. They smoked marijuana with others, including a man Crowder casually knew as "Nick," who was with two other men. ER 738-40, 894-98. Meanwhile, Drummond, Nkele, Massey, and Esho, had several drinks at a friend's house, a fraternity house, and Kip's Bar in Berkeley. ER 644-49, 834-35, 970-71.

Around 1:20 a.m., in an unrelated incident, a man accidentally shot himself across the street from Blake's, and police were on the scene. ER 604, 1069-70.

Around 1:30 a.m., Crowder stepped outside Blake's into a large crowd and said goodnight to people, including "Nick." ER 899-901. About the same time, Nkele, Esho, Massey and Drummond, arrived outside Blake's. ER 601-02, 834-35, 972-73. Massy noticed Crowder, but did not speak to him. ER 835. Esho greeted Crowder, but he did not reciprocate. ER 602. Esho noticed Crowder tapped a man behind him, pointed at Drummond, and said, "That's him. That's him." ER 601-03.

Drummond and Crowder "started trash talking back and forth," yelling and calling each other "bitch." ER 603, 716-17, 902-05. Massey heard them arguing, but didn't pay close attention. ER 835, 842, 973-77, 999. Esho tried to break up the argument, but Crowder and Drummond decided to fight around the corner away from police investigating the earlier shooting. ER 603-06, 836, 902-06.

A crowd, including Esho, followed by Massey, the man Crowder tapped, and a third man, followed Crowder and Drummond. ER 605-06, 837-38. The man Crowder tapped was "behind" Esho, but he heard the man say, "I don't know how to fight, but I know how to use this metal." ER 605, 607, 904, 1149, 1178-79.

2. A third man pointed a gun at Drummond and asked for his wallet; They struggled for the gun, it fired, and Drummond ran away.

Once around the corner from Blake's, Drummond and Crowder called each other "bitches," and pushed each other. ER 903-06. Drummond pointed at Crowder, the man Crowder tapped, and a third man, saying, "I'll fuck you up, I'll fuck you up," "I don't care. I'll fight anybody." ER 609-10, 838-39, 906-07.

Massey heard Crowder say, "Yo, somebody handle this," and saw a man (whom he did not recognize), emerge from the crowd and put a gun under Drummond's chin. ER 612, 839-40, 843-44. According to Esho, the man Crowder tapped earlier was the gunman. ER 602-03, 1149-50. Esho heard the gunman say, "You need to give me your wallet right now," but Esho thought he was embarrassing Drummond, not robbing him. ER 610-13, 631, 634, 642, 1161-62. Massey thought the man said, "give me your wallet or break yourself." ER 1106.

When he saw the gun, Esho "froze." ER 611-13, 677, 1151. Drummond pushed the gun away, grabbed the barrel, and tried to wrestle it from the man. ER 613, 616, 841, 843. During the struggle, a shot fired and Drummond ran off. ER 614, 616, 750, 841, 845. Nkele heard gunfire, but didn't see what happened. ER 978. Massey didn't see the gunfire. RT 841-42. Esho and Crowder, only a few feet away, saw the gunman pull the trigger. ER 614-15, 744.

Massey retrieved Drummond's wallet from the sidewalk, and he, Nkele, and Esho ran after Drummond. ER 620, 845. Esho focused on Drummond while he and the gunman followed Drummond. ER 616-17, 1152. The gunman said, "he tried to grab my pistol." ER 616-17. Esho was behind the gunman, caught up to him, and speaking from the side, told him to leave, and the man ceased chase. *Id.*

3. No one realized Drummond was shot until it was too late.

Esho saw no blood or bullet wound on Drummond's white t-shirt. ER 618-20. When Massey and Nkele arrived, Esho told them what happened. ER 620, 845-46, 981-84, 1027-28. No one realized Drummond was shot. ER 619, 749, 846, 984, 1012, 1025, 1073. Nkele left to meet Crowder. ER 965-66. When Crowder left to meet a girl, Trevina, at a Chevron station, Nkele returned to Drummond only to find him unable to stand, slurring words, and asking for water. ER 752-55, 846, 986-87, 998, 1016, 1073. Esho left to buy water and bought it from the same Chevron station where Crowder met Trevina. ER 620-22. Esho left the station at 1:54 a.m. ER 625. Drummond could not drink the water. ER 626.

Around 2:00 a.m., Berkeley Police Officer McIntosh, who was on patrol, stopped to assist Drummond. ER 987-88, 1069-75. McIntosh saw no injuries or blood and Drummond appeared intoxicated. ER 1072-74. No one told McIntosh about the argument or gun incident. ER 987-88, 1074, 1085.

Nkele, Massey, and Esho took Drummond to a sorority house, where Nkele lived. ER 627, 965-66, 989-90, 1019-20, 1024-25. Inside, Esho, realizing Drummond was not responsive, called 9-1-1 while Nkele started C.P.R. ER 627-28, 848. Drummond died of internal bleeding from a gunshot to his hip. ER 953-54.

B. The investigation.

1. Nkele, Massey, and Esho identified Crowder but not the gunman.

Several hours later, Nkele, Massey, and Esho each identified Crowder as the man Drummond argued with the night he died. ER 633-34, 993-94, 1105-06, 1108.

Massey told police a man called "B" (Brandon Crowder, not Beaudreaux) was involved, but he did not see the gun when it fired and was not sure he would recognize the gunman if he saw him again. ER 833-35, 841-42, 862-63.

Esho initially told police he didn't know what happened, but eventually confessed someone put a gun to Drummond's neck and the gun fired. ER 1087-88, 1091-92, 1151-52. Esho told police he never saw the gunman before and did not know him. ER 564-66, 1166. Esho described the gunman as a black male, about 18 years old, his same height (6' 1"), skinny build with a darker complexion than his own, wearing a short-sleeved shirt. ER 564-66, 654-61, 1090-94, 1166.

2. Crowder did not identify the gunman during four interviews.

Two days later, Crowder told police he went to middle school with the gunman, but did not know his name. ER 685-86, 730, 914 917. Crowder refused to look at middle school yearbooks until the next day. ER 686, 917-18. The next day, Crowder looked at a 1997-98 yearbook containing Beaudreaux's middle school photo and name, and a 1998-1999 yearbook containing his name, but did not identify him. ER 686-87, 730. Crowder said Eddy Jones and Maurice Gamble were at Blake's the night of the incident, but did not say Michael Durant, Benjamin Petrofsky, Jack Nicholas, Khalid Stringer, Trevina, "T," and Joshua, were also there. ER 688-89, 724-25, 927-29. The next day, Crowder looked at yearbooks containing Beaudreaux's name and photo, but did not identify him. ER 689, 717-18, 730. Ten days later, Crowder again failed to identify the gunman. ER 689-90, 730-31.

3. No physical evidence identified the gunman.

Police did not find the gun, blood, bullets or bullet casings at the scene, in Esho's car, or at the sorority house. ER 950-51, 1034-35, 1040.

Police did not interview any of the people Crowder told them were at Blake's the night Drummond was shot. ER 794-95, 927-32. Officer Murphy thought it important to do so, but didn't because she was not the lead investigator. ER 927-32.

In September 2006, Esho viewed lineup arrays containing photos of Eddie Jones and Maurice Gamble, but did not identify either. ER 634-35, 796-97.

Drummond's hands tested positive for gunshot residue. ER 631, 767, 849, 1079. The wound location was consistent with Drummond pushing the gun away

and turning to run when he was shot. ER 949. Gunshot residue on Drummond's hands made it possible he was holding the gun, pulled the trigger, or was in the gun's vicinity when it fired. ER 768-69, 958-59.

4. Crowder threatened to kill another man more than a year later.

More than a year later, on December 17, 2007, Crowder got into another argument — this time, with Roger Cox. ER 888-89. During a basketball game, Crowder threatened to kill him and have his friends jump him. ER 711-12, 888-89. Less than a month later, police found a Berkeley student I.D. for another person at Crowder's home and Crowder admitted threatening Cox. ER 889-90. Crowder was charged with terrorist threats against Cox and possession of the stolen I.D. ER 891. Crowder admitted his threats to Drummond and Cox were similar. ER 715-17.

5. Crowder identified Beaudreaux after police threatened murder charges.

A month later, Detective Sabins telephoned Esho and Nkele about the Drummond case. ER 635-36, 776.

A week later, Crowder turned himself in to police after receiving notice of the terrorist threats and possession of stolen I.D charges. ER 692, 711, 891.

That same day, Detective Sabins and Officer Murphy interviewed Crowder about Drummond's death for "several hours." ER 692, 725, 731, 777, 1114-15. Sabins repeatedly asked Crowder who shot Drummond, and Crowder repeatedly said he went to middle school with the man, but did not know his name. ER 778. As the interview wore on, Sabins "alluded" Crowder "could be held responsible for part of this," and told Crowder, "you're going to go to the jail for murder on your own," and "[i]t's either you sit in the defendant's stand by yourself or you sit there

with the guy that actually pulled the trigger." ER 779, 792-93. This prompted Crowder, "scared" and "nervous," to say, "Nicholas Broussard." ER 693.

Officer Murphy looked "through the yearbooks," "found the person" she was "looking for in a specific year," and took it to Crowder. ER 541-46, 694, 779-80, 932-33, 1115-16. Murphy "didn't do anything that would tell him what page to go to pick out someone," "didn't guide or steer" him in any particular direction, and did not show him a specific photo. ER 780, 934, 940, 1116-17.

Crowder identified Beaudreaux as the gunman. ER 694, 780-82. Although Beaudreaux's name and photo were in the yearbooks, Crowder didn't previously point him out to police because he did not know his name until December 2007. ER 541-44, 690, 732, 793-94, 939. Murphy prepared a six-man photographic lineup array containing a July 8, 2007 photo of Beaudreaux, and Crowder selected that photo. ER 259, 694-97, 780-82, 933-38, 1118-19; Trial Exhibit 13.

6. No one corroborated Crowder's identification of Beaudreaux.

The next day, Valentine's Day 2008, Detective Sabins and Officer Murphy showed Massey a photo lineup array (identical to the one they showed Esho the same day),[1] but Massey failed to make a positive identification. ER 229, 265 787-88, 852, 863, 922-23, 1121-23; Trial Exhibits 14 and 16. Massey said the police told him to choose the "closest" person in the array. ER 237, 863. According to police, Massey was "disinterested," "unconcerned," "kind of glanced over it," but eventually excluded the photograph in position two. ER 265-66, 274-76, 804-05, 1122-23.

---

[1] Petitioner mistakenly asserts the first lineups shown to Esho and Massey are not identical. Pet. 4.

The same day, Sabins and Murphy showed Esho a photo lineup array (identical to the one they showed Massey that day), to see if he would "corroborate" Crowder's identification. ER 260-61, 570-72, 782-84, 798, 923-25, 1119-21; Trial Exhibits 14 and 16. Esho did not make a positive identification; he said Beaudreaux's photo was the "closest" "the photograph shows his face a little wider and his head a little higher." ER 261-262, 570-72, 1120-21, 1173.

Six hours later, Sabins, not entirely satisfied with the results of Esho's earlier viewing, returned alone and showed Esho a second lineup array that included a different photo of Beaudreaux in position two. ER 229, 262-264, 272-73, 567-69, 637-38, 784-86, 798-801, 1174-75; People's Trial Exhibit 17. Sabins used a 2007 photo of Beaudreaux in the first array, and a 2006 photo in the second array. ER 263, 784-86. Although Beaudreaux appeared in both arrays, none of the other men in the first array was included in the second array. ER 567-72. Once again, Esho did not positively identify Beaudreaux as the gunman; he merely said, "I feel No. 2 [Beaudreaux] is very close, based on my recollection of the events that occurred the night Wayne was killed." ER 264-265 568, 1175.

The next day, police arrested Beaudreaux even though no one corroborated Crowder. ER 268, 790, 1123-24. Two days later, Sabins met Massey at the police station, "to persuade" Massey "to get involved in the case" since his friend was murdered, and showed him a second lineup array. ER 806; Trial Exhibit 15. Seeing Beaudreaux's photo a second time, Massey said Beaudreaux's photo had "similar characteristics" but did not positively identify him. ER 268, 278-79, 593, 853-55.

C. Pretrial proceedings.

1. Crowder and Beaudreaux were each charged with first-degree murder.

Crowder and Beaudreaux were each charged with first-degree murder, in violation of California Penal Code § 187(a), and attempted second-degree robbery by means of force and fear in violation of Penal Code § 211, while armed with a firearm in violation of Penal Code § 12022(a)(1). ER 1142. It was alleged they each intended to inflict great bodily injury, inflicted great bodily injury, and personally used and discharged a firearm causing great bodily injury, in violation of Penal Code §§ 1203.075, 12022.5(a), 12022.7(a), and 12022.53(d). *Id.* Crowder also faced charges for terrorist threats and possession of the stolen I.D. *Id.*

2. Esho identified Beaudreaux when he saw he was Crowder's codefendant.

Crowder and Beaudreaux attended the preliminary hearing. ER 639, 1147. Esho read a newspaper report that police arrested a suspect for the Drummond shooting. ER 1180-81. When Esho saw Beaudreaux in court, it was "pretty easy to pick him out," and he "figured" Beaudreaux "was the man." ER 672, 1181-82.

Esho testified his memory was better the night of the shooting than at the preliminary hearing (more than two years later). ER 1158. Esho was closer to being drunk than sober the night of the shooting. ER 1156. Esho admitted he had forgotten "a few things because of the alcohol" he drank and because he was in shock, the night of the shooting. ER 654, 1157-58.

Esho never saw the gunman before the night of the shooting. ER 1150. He initially said the gunman walked next to him when Crowder and Drummond went around the corner to fight, but later said the man was "behind him." ER 1149, 1179.

When Police showed Esho the first lineup array containing Beaudreaux's photo, Esho was "was pretty sure it wasn't" the gunman. ER 1174. Although he told police Beaudreaux was the "closest," he was not sure because "it had been some time" since the event. ER 1169. Esho identified Beaudreaux when he saw him as Crowder's codefendant at the preliminary hearing. ER 1154-55.

3. Defense counsel complained of back pain.

During motions in limine, Beaudreaux's counsel apologized to the court for not standing up, and explained his back was "killing" him. ER 217, 1130.

D. The Trial

1. Crowder turned state's evidence after jury selection.

Crowder and Beaudreaux jointly selected a jury and Beaudreaux's counsel prepared his case not expecting Crowder to testify. ER 1048-57. After jury selection, Crowder plead no-contest to manslaughter, and agreed to testify against Beaudreaux, in exchange for probation (with time served) and dismissal of the remaining charges in his two cases. ER 881-82, 1128. Beaudreaux's counsel moved for mistrial and dismissal of the jury panel because he would choose different jurors than Crowder's counsel chose, would ask different voir dire questions, the jury saw Crowder and Beaudreaux as co-defendants, he did not expect Crowder to testify so he did not prepare his cross-examination; the motion was denied. ER 1048-1057.

2. Defense counsel was admitted to a hospital emergency room.

On Monday, June 29, 2008, defense counsel said he went "to the emergency room at Highland Hospital" the prior Saturday. ER 825. He had back pain for some time, and it was not tolerable. *Id.* The doctor prescribed Vicodin and referred

him for an MRI. *Id.* His symptoms were consistent with radiculopathy, which is a "compressed nerve," that might need surgery. *Id.* The doctor told him to "return to work in five days," and counsel told the court, "I don't feel I'm able to function today, but, you know, I have a pulse and I'm sitting here," and "I do feel the effects of the Vicodin I've taken, and I'm still in significant pain." ER 825-26.

The prosecution urged the court to continue the trial. ER 826. The court "didn't care what the People's position is, quite frankly." *Id.* The court said, "we all get these back issues as we age." ER 827. The doctor's note, stated, "[r]estrictions, no work requiring repetitive bending." *Id.* The court said, "you are going to have this back pain. There's not too much I can do about it, and I don't think there's much you can do about it." ER 828. Counsel was ready to question Massey, but concerned about questioning Crowder the next day. ER 829-30.

3. **Massey did not corroborate Crowder's identification of Beaudreaux.**

Massey testified Beaudreaux's photograph in the second line up shown to him had "similar characteristics" to the gunman, but Massey "did not know" whether Beaudreaux was the gunman or not and resisted identifying him unless he was "absolutely sure." ER 593, 805, 844, 854. Massey also was not "a hundred percent sure" the gunman asked Drummond for money. ER 850-52, 856-57. Massey was, however, sure that Crowder is a liar. ER 858-60.

4. **A recording attributed to Beaudreaux was admitted into evidence.**

On February 19, 2008, Martin Magree drove a van that transported Beaudreaux and Crowder to and from the jail and court. ER 866-69. Magree was

told a recorder was placed in the van. ER 869. Magree did not hear conversation between Drummond and Crowder, but listened to the compact disc recording. ER 871-72; Trial Exhibit 23. He agreed it was "sometimes hard to hear the exact words that were being said," and "parts of it are hard to understand," as the recording picked up other noises, but where words were unclear the transcript stated it was "unintelligible." ER 873, 877. Although he did not hear everything, he agreed a transcript (Trial Exhibit 23A) was accurate. ER 870-72, 877.

Defense counsel disputed the accuracy of the recording's transcript (Exhibit 23A) because the recording was largely unintelligible. ER 704-05. The court admitted the recording as evidence (Trial Exhibit 23), but did not admit the transcript (Trial Exhibit 23A) as evidence. ER 704-05, 563, Trial Exhibit 23. The court permitted the jury to use the transcript as an "aid" to comprehending the recording, but instructed the transcript was not evidence. ER 679, 700-01, 704-05, 915-16. The transcript attributes Beaudreaux as saying, "You think it's hard now? Shit's about to get real out here . . . . Respect my gangster . . . . No turning back." ER 563, 700-05; People's Trial Exhibit 23, 30:18. The transcript also attributes Beaudreaux as saying, "You just better start praying man because your life is about to change in about one damn minute now. You'll never see daylight again," and, "Man, fuck this . . . timing." ER 563, 700-05; People's Trial Exhibit 23 at 55:30.

5. Crowder identified Beaudreaux as the gunman.

Crowder testified Beaudreaux had pulled out a gun and pointed it at Drummond when Drummond told him he would "fuck him up." ER 906-07. He said

Beaudreaux told Drummond "You need to give me your money right now." ER 908. Drummond paused and grabbed the gun barrel. ER 908-09. Drummond and Beaudreaux were still struggling over the gun when it fired one shot. ER 614, 909. Crowder was only a few feet away and saw Drummond's hand on the barrel while Beaudreaux pulled the trigger. *Id.* Crowder identified the recorded comments attributed to Beaudreaux. ER 700-04; Trial Exhibit 23.

6. Counsel said he could not effectively represent Beaudreaux.

On Tuesday, June 30, 2009, counsel told the trial court he didn't "feel that Mr. Beaudreaux has an attorney in the meaningful sense of the word. My back hurts real bad and I should be either getting my MRI or lying down." *Id.* Working the previous day "exacerbated the situation," he was in "bad pain" and was "unable to concentrate on what Mr. Crowder was saying yesterday." *Id.*

The court was "amazed with the amount of time that [counsel] spent and the issues that [counsel] took up with some of these witnesses." ER 817. The court said counsel performed "well and beyond anybody I've seen in any courtroom as it relates to cross-examining and dealing with issues with witnesses." ER 818. The court noted counsel doing something with the video after court recessed the prior day. *Id.* The court again complained of back pain that morning, and every day, due to sciatica, but boasted the court was "there." *Id.* The court said counsel's performance was "totally contrary to the state of condition" he indicated he was in "yesterday." *Id.* Counsel stayed after recess "yesterday" to get the computer to display Crowder's recorded interview, but it still didn't display it. ER 818-19. He left for another court because he already delayed it a week and lay down at 4:00

p.m. until morning. ER 819. He "got up this morning and I felt worse than I did yesterday, and was "unable to do the things that he needs to do and can't concentrate," and all he could think about was how bad his back hurt. ER 819-20. He took Vicodin at 5:00 a.m. ER 820. He said, "if the court thinks that I'm malingering or I'm just trying to make an excuse to delay the thing, that's an assessment the Court has to make," but "I'm telling you, I'm in pain. I'm not able to do my job. And if the Court is ordering me to proceed, that's what I'm going to do, but I'm just not --- I should be lying down." ER 819. He promised to "try to do the best I can, but my best at the moment is not much." ER 817. Counsel said his client's interests were prejudiced. ER 818. The court asked if he could not effectively represent Beaudreaux; counsel answered yes. ER 821.

7. Counsel's doctor directed him to stay off work.

The next day, counsel brought a doctor's note directing him "to be off work until the 6th of July." ER 683. He felt the same as the prior day, "which is not good." *Id.* He asked to put his County Medical Center letter in the court file. *Id.* He wasn't "trying to make any posture or tactics or anything" but he "just" didn't "feel good." *Id.* He was "in a lot of pain," but inexplicably agreed to proceed because he didn't "want all these people sitting here and waiting for me." *Id.* The court later said counsel "had an incredibly extensive cross-examination of each of the witnesses" and he "performed as he generally does" "It doesn't appear that anything suffered in terms of his abilities here." ER 812-13. Counsel replied, "I'm in some pain and distress, but I'm trying to do the best I can." ER 813.

8. Crowder admitted he repeatedly lied to police and identified Beaudreaux only after police threatened to charge him with murder.

At trial, Crowder testified he identified Beaudreaux because he didn't want to go to trial for murder. ER 709-10. As soon as Detective Sabins told Crowder he was going to be charged with murder by himself "if he didn't come up with a name," Crowder gave him a name: "Broussard." ER 732, 734, 762. Crowder was "pretty nervous," during the February 13, 2008 interview, and "the questions were coming fast," so he spoke "impulsively." ER 744-46, 755, 757, 761. Crowder justified his changed story by saying he didn't' want to go to jail for something he "had nothing to do with." ER 708-09, 734. Yet, Crowder admitted, by virtue of his no contest plea to manslaughter, he admitted he was "involved." ER 709-10. Crowder plead because he didn't' "want to risk going to prison" for the rest of his life, and wanted to "go home." ER *Id.* Unlike his lies to police and the court, Crowder claimed he was telling the truth so he could go home and didn't tell court he was innocent because he didn't want to risk going to prison for the rest of his life. ER 708-10.

Crowder did not identify Beaudreaux during the first four police interviews because he feared retaliation. ER 721, 734, 722, 732, 753, 916-17. He didn't confirm Beaudreaux's name until December 2007, when he saw him at a party, just "to make sure that he was the person who I see in the yearbooks." ER 732. Crowder said Beaudreaux told him he owed him one. *Id.*

Although Crowder lied to police for his benefit (to avoid retaliation and being labeled a snitch), he denied lying at trial to obtain his plea bargain benefits (time served). ER 685-87, 706-09. Once in jail, it became his "duty" to tell the truth. ER

707-08. Although he went to jail after he gave Beaudreaux's name, Crowder thought lying "got him into jail," but telling the truth would get him out. ER 708.

9. The lineup procedure was unusual and a departure from training.

Sabins showed the photo lineup arrays containing Beaudreaux's photo to Esho and Massey to see if they would "corroborate" Crowder. ER 270, 798-99. Sabins admitted it was not common practice to show the same witness two different lineups that included the same person at different times, as with Esho. ER 274, 567-72, 802; Trial Exhibits 16 and 17. Murphy, when asked why Sabins employed the successive lineup sequence with Esho, testified police officers "are not trained that way," and "this was an unusual thing because they are not trained to go back and try it again if they can get an idea earlier in the day." ER 926-27.

10. Esho corroborated Crowder' identification although Beaudreaux did not match his initial description of the gunman and he did not identify him in two pretrial photo lineup arrays.

At trial, Esho testified his best description of the gunman was the day of the incident. ER 288, 661. He admitted his memory was affected by the alcohol he drank the night of the incident, but his recollection was better the night of the incident than at trial three years later. ER 288, 654.

Esho admitted Beaudreaux did not match his initial description to police the day of the incident, and he did not recall all of the details about the shooter. ER 288-92, 654-59; Trial Exhibit 18. Esho initially told police the gunman was his height, about 6' 1", and, at trial, agreed Beaudreaux was shorter. ER 290-293, 655-59. Esho initially told police the gunman's complexion was darker than his own, but backed away at trial saying Beaudreaux's was "medium." ER 290-293, 656-57.

Although he never mentioned it to police or at the preliminary hearing, Esho testified he didn't positively identify Beaudreaux in the first array because he couldn't say for sure "with the photo." ER 281-283, 57072, 674; Trial Exhibit 16.

Esho admitted he may have relied on the first lineup photo to assist him in focusing on Beaudreaux's photo in the second array, but didn't do it "on purpose," "it might just be a thing that happens unconsciously." ER 283-84, 567-69, 673.

Esho told the jury he identified Beaudreaux at the preliminary hearing because "he was the right person." ER 675. Esho testified when he saw him in court, it "just basically clicked." ER 284-85, 640. Although Esho did not mention it to police, he testified he wanted to see Beaudreaux in person because "there were a few things that I just remember just about him." ER 284, 639. Esho did not say what those "things" were other than he recognized "sort of the way that he walked." ER 284-85, 649. At the preliminary hearing, Esho testified there was nothing unusual about the gunman and said nothing about his walk; at trial, he did not say he recognized anything distinctive or unusual about the walk. ER 285, 1166-67. He testified he was positive Beaudreaux was the gunman who asked for Drummond's wallet, but didn't think the man intended to rob Drummond. ER 640-44, 1161.

11. Beaudreaux was convicted and sentenced to 50 years to life

The jury convicted Beaudreaux of all charges. ER 552-53. The trial court sentenced Beaudreaux to 25 years to life for murder, with a 25 to life enhancement, for a total indeterminate term of 50 years to life in prison, but stayed a 27 year to life sentence for attempted robbery. ER 536-40.

E. The state courts affirmed the convictions and denied habeas relief.

Beaudreaux filed a direct appeal and companion habeas corpus petition. ER 392, 535. The state court of appeal affirmed and denied habeas corpus, and the state supreme court summarily denied petitions for review. ER 309-11, 341-51.

Beaudreaux filed a petition for writ of habeas corpus, contending counsel was ineffective for failing to object or move to exclude Esho's in-court identification as the product of suggestive police identification procedures in violation of the Sixth and Fourteenth Amendments and *Strickland v. Washington*,466 U.S. 668 (1984).[2] ER 161. Counsel filed a declaration, under oath, stating, in relevant part:

> Had I been functioning at full capacity, I would have moved to exclude the identifications as unduly suggestive. I do not remember considering such a motion in this case. I can only say again that I was in great pain and mental distress as the result of my back injury and being forced to continue with the trial to my own detriment as well as Mr. Beaudreaux's.

ER 129. Counsel stated, "this is another example of my difficulties that denied Mr. Beaudreaux the effective representation of counsel." *Id.* The state courts summarily denied the petition. ER 47, 137, 160.

F. The federal district court affirmed, but the court of appeals reversed.

Beaudreaux filed a federal petition under 28 U.S.C. § 2254. ER 48, 82. The district court denied relief, but certified the issue for appeal. ER 35-37, 41-42.

---

[2] It is unclear whether petitioner now claims Beaudreaux's second state habeas corpus petition is procedurally barred as untimely or successive. Pet. Fn 2. If so, Beaudreaux objects because petitioner waived and/or forfeited that claim by conceding the petition was timely and failing to pursue it in federal court.

On September 18, 2017, a Circuit panel majority reversed, in an unpublished opinion. Pet. App. 1a-8a. On November 8, 2017, the Circuit denied the state's petition for rehearing and rehearing en banc. Pet. App. 9a.

REASONS TO DENY CERTIORARI

A. The Circuit's decision will have little, if any, influence on other cases.

Certiorari is unwarranted because the Circuit's decision will have few ramifications, if any, on other cases, due to the highly unusual facts and fact-bound conclusions presented in this case. Pet. App. 1a-7a.

B. The Circuit correctly stated and applied AEDPA deferential review.

Certiorari is also unwarranted because the Circuit decision does not disturb, and in fact affirms and faithfully applies, the stringent review standards required for *Strickland* claims brought pursuant to 28 U.S.C. § 2254(d)(1) ("AEDPA").

A federal court may only grant relief under 28 U.S.C. § 2254 if the state courts' denial of relief, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," as set forth in 28 U.S.C. § 2254(d)(1). Where, as here, the state courts summarily denied relief, a federal habeas court must "consider all arguments and theories that could support" the state court's denial of federal constitutional relief, and "determine whether fair-minded jurists would have to agree that every one of those theories and arguments must be rejected as inconsistent with the holding in a prior decision of this Court," before it may grant relief. *Harrington v. Richter*, 562 U.S. 86, 101 (2011), *citing Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Federal courts must give "doubly deferential" review to *Strickland* claims under AEDPA in order to afford the state court and defense counsel the benefit of the doubt. *Woods v. Donald,* 575 U.S. 1, 5 (2015). As such, federal habeas courts indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 3. To overcome that presumption, defendant must show counsel failed to act reasonably considering all the circumstances. *Cullen v. Pinholster,* 563 U.S. 170, 189 (2011).

The Circuit here expressly applied the requisite "doubly deferential" standard for AEDPA *Strickland* claims. Pet. App. 6a-7a. The Circuit expressly relied on *Pinholster,* 563 U.S. at 190 and 28 U.S.C. § 2254(d)(1). Pet. App. 6a-7a. In addition, the Circuit decision expressly acknowledged Beaudreaux has a "high burden" and the "requirements of AEDPA" are "stringent." Pet. App. 7a.

C. The Circuit correctly applied AEDPA review for the *Strickland* deficiency prong.

The Sixth Amendment right to effective assistance of counsel is denied when (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland,* 466 U.S. at 687.

To prove counsel's performance deficient, it must be shown "counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 at 687-89. The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Kimmelman v. Morrison,* 477 U.S. 365, 381 (1986), *citing Strickland,* 466 U.S. at 689. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland,* 466 U.S. at 688.

Federal habeas courts must be careful when considering a *Strickland* claim, not to confuse "unreasonableness" under *Strickland,* with "unreasonableness" under § 2254(d). *Richter,* 562 U.S. at 105. When 2254(d) applies, the question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland's* deferential standard. *Id.*

The Circuit's decision did not confuse reasonableness under Strickland with reasonableness under AEDPA. The Circuit reviewed the *Strickland* deficiency prong by indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Pet. App. 2a. The Circuit required Beaudreaux "overcome the presumption that, under the circumstances," counsel's failure to move to exclude Esho's identification testimony as the product of impermissibly suggestive procedures, "might be considered sound trial strategy" from the standpoint of objectively reasonable jurists. Pet. App. 2a, citing *Strickland,* 466 U.S. at 689 (internal quotation marks and citation omitted).

The Circuit held "a conclusion by the state court" that counsel was not deficient was "not reasonable" "in light of . . . the lack of any tactical advantage to declining to move to exclude Esho's identification, and defense counsel's declaration that he recalled no strategic motives for failing to move to exclude Esho's identification testimony." Pet. App. 7a, citing *Kimmelman,* 477 U.S. at 385-86.

1. There is no reasonable basis to conclude counsel's inaction was strategic.

The Circuit considered counsel's sworn declaration, in which he testified he "did not remember considering filing a motion to exclude Esho's identification testimony," and his failure to do so "denied Mr. Beaudreaux the effective assistance

of counsel." Pet. App. 3a. The Circuit acknowledged counsel's statements reasonably support a conclusion his failure to move to exclude Esho's identification testimony, as the product of impermissible suggestive pretrial police procedure was not based on sound trial strategy. Pet App. 2a. The Circuit did not stop there.

Consistent with its responsibility to consider alternative reasonable bases for the state courts' denial of relief, the Circuit considered whether the state courts had a reasonable basis to conclude defense counsel's inaction was reasonably tactical *despite* counsel's testimony his inaction was reasonably tactical. Pet. App. 2a.

The only reasonable conclusion fair-minded jurists can reach is there was a strong tactical benefit to moving to exclude Esho's identification testimony since prevailing on the motion "would have eliminated an identification of central importance to the prosecution's case." Pet. App. 3a. The lack of "countervailing procedural or substantive risk to Beaudreaux," bolsters this conclusion. *Id.*

Other than Crowder and Esho's identifications, there was no evidence connecting Beaudreaux to the crime, i.e., no fingerprint, photograph, surveillance video, DNA, trace blood, weapon, confession, or hearsay admission, evidence to support the identification. *Cf. Foster v. California,* 394 U.S. 440, 442 (1969). Esho's identification was critical to corroborate Crowder's accomplice identification, so the jury could consider it under California Penal Code § 1111.[3] Esho lent necessary

---

[3]3Independent evidence that corroborates portions of an accomplice's testimony, but does not tend to connect the defendant to the crime, is not sufficient corroboration of accomplice testimony for Penal Code § 1111. *People v. Pedroza* (2014) 231 Cal.App.4th 635; *Cf. Foster*, 394 U.S. fn 1.

credibility to the state's case. Crowder, a known (and admitted) liar, had an incentive to name someone else, to, in his own words, avoid "going to prison for the rest" of his life, and plead no contest in exchange for time served, but Esho, had no criminal record and was not induced by a plea agreement. Pet. App. 6a.

The Circuit correctly found no reasonable basis to conclude counsel's failure to move to exclude Esho's identification was excusable as tactically advantageous to Beaudreaux's defense. Pet. App. 2a-3a, relying on *Strickland*, 466 U.S. at 673.

2. The Circuit's decision is not contrary to *Knowles v. Mirzayance*.

Petitioner claims the Circuit's decision impermissibly found counsel was deficient because there was "nothing to lose" by making the motion, contrary to *Knowles v. Mirzayance*, 556 U.S. 111, 121-122 (2009). Pet. 12, fn 3.

In *Knowles*, counsel's performance was not deficient because the claim he failed to pursue "stood almost no chance of success." *Id.* at 122-23.

Here, there was much to gain by moving to exclude Esho's identification testimony since it would eliminate an identification "of central importance to the prosecution's case." Pet. App. 3a. As explained earlier, Esho's identification was needed to corroborate Crowder's identification.

3. There is no reasonable basis to conclude a motion to exclude Esho's identification as the product of suggestion would not succeed.

The Circuit found no reasonable basis for the state courts to conclude a reasonable attorney would have considered a motion to exclude Esho's identification testimony unlikely to succeed. Pet. App. 2a-5a. From the perspective of a

reasonable competent criminal defense attorney, the motion had a "significant chance of success." Pet. App. 3a.

Petitioner claims, "a significant chance of success," stops "well short of any ruling that an objection to the Esho testimony would actually have succeeded as a matter of federal constitutional law." Pet. 12. Petitioner claims counsel "might not have chosen to object" "because the objection was not likely to succeed." Pet. 11.

The record does not support petitioner's claims. The Circuit considered whether it was reasonable to conclude the motion would have failed, but determined there was no reasonable basis to conclude so under the totality of the circumstances on this record and under this Court's well-established authorities. Pet. App. 3a-5a, relying on *Simmons v. United States*, 390 U.S. 377, 383 (1968); *Foster* at 440, 442-43; *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

And the record supports the Circuit's conclusion: all reasonable fair-minded jurists must agree, based on Esho's preliminary hearing testimony, the lineups, this Court's decisions in *Simmons*, *Foster*, and *Biggers*, and the resemblance of the identification procedure here with the "third-time-is-a-charm" procedure this Court rejected in *Foster*, a reasonable competent criminal defense attorney would have moved to exclude the identification because the motion had merit. Pet. App. 3a-5a.

D. The Circuit correctly applied AEDPA review to *Kimmelman*'s requirement that a motion to exclude Esho's identification testimony must have merit to satisfy the *Strickland* deficiency prong, and found the motion had merit.

To prevail on a *Strickland* claim based on counsel's failure to move to exclude evidence, the motion must be meritorious. *Kimmelman*, 477 U.S. at 375.

1. **All fair-minded jurists must agree Esho's identification was the product of impermissible suggestive pretrial police procedures under this Court's well-established authorities or a reasonable extension thereof.**

The Circuit considered whether the state courts could reasonably find Esho's pretrial lineup procedures were not unduly suggestive for purposes of determining whether a motion to exclude Esho's identification had merit, as required by *Kimmelman,* in order to satisfy *Strickland.* Pet. App. 2a-5a, 7a.

The Circuit correctly looked to *Simmons,* 390 U.S. 377, in which this Court pronounced a two-part test for ascertaining whether in-court identification testimony must be excluded as the product of tainted pretrial procedures. Pet. App. 4a. *First,* defendant must show the eyewitness identification was derived through "impermissibly suggestive means." *Id.* at 384. If that burden is met, the trial court must determine whether the identification was otherwise unreliable under the "totality of the circumstances." *Id.* at 383. If there is a substantial likelihood of irreparable misidentification, the evidence must be suppressed. *Id.* at 384. If indicia of reliability outweigh the corrupting effect of the police-arranged suggestive circumstances, the evidence is admissible. *Id.*

The Circuit also looked to *Foster,* 394 U.S. 440. Pet. App. 4a. In *Foster,* a bank robbery accomplice implicated Foster as the man who helped him rob a bank. *Id.* at 441. Police needed independent corroboration for the accomplice's identification pursuant to California Penal Code § 1111. *Id.* at 442, 451, fn 1. Police showed Foster to the bank's night manager twice under suggestive circumstances, but the manager failed to positively identify Foster. *Id.* at 442. The third time the police showed Foster to the manager was a charm: the manager was convinced

Foster was the man. *Id.* at 442-43. The evidence against Foster consisted of (1) the accomplice's testimony, (2) the manager's identification testimony, and (3) Foster's previous conviction for a similar robbery. *Id.* at 442, 444-45. This Court reversed the conviction because the cumulative effect of showing Foster to the manager constituted suggestive pretrial police procedures that led to an unreliable identification. *Id.* at 442-43. This Court held admitting the identification into evidence violated due process, and it should have been excluded as the product of suggestion because, under the totality of the circumstances, the procedure was the equivalent of telling the witness "this is the man." *Id.* at 443. This Court concluded: "The suggestive elements in this identification procedure made it all but inevitable that (the witness) would identify petitioner whether or not he was in fact "the man." *Id.*[4] The same is true for Esho.

The Circuit here carefully considered the state court record: (1) More than seventeen months after the shooting, police showed Esho two successive photographic lineup arrays (in one day) that contained six men; (2) Beaudreaux was the only man depicted in each array; (3) the officer who presented the arrays to Esho testified it was not common practice to show the same individual in successive arrays; (4) Esho did not make a positive identification from either array; (5) when Esho saw the first array, he was "pretty sure" Beaudreaux was "not" the killer; (6) when Esho saw the first array, he stated Beaudreaux's photograph was the "closest"

---

[4] *Foster* did not consider whether the error was harmless under *Chapman v. California*, 386 U.S. 18 (1967). *Id.* at 444. Per se exclusion was later rejected in *Biggers*, 409 U.S. at 198-99.

but the photograph showed a man whose "face [was] a little wider and his head a little higher;" (6) when Esho saw the second array, he stated Beaudreaux's photograph was "very close," (7) Esho testified he may have unconsciously relied on the first photographic array when he told police Beaudreaux's photograph was "very close" in the second array; (8) Esho still did not positively identify Beaudreaux after he was shown the two arrays; (9) Esho only positively identified Beaudreaux upon seeing him at the preliminary hearing. Pet. App. 4a.

Apropos of the record, the Circuit noted "[t]he suggestiveness of identification procedures – and the danger of misidentification – increases when, as here, "the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." Pet. App. 4a, relying on *Simmons* 390 U.S. at 383, and *Foster*, 394 U.S. at 442-43. Relying on *Foster*, the Circuit noted courtroom procedures might be suggestive in certain circumstances, such as here. Pet. App. 4a, citing *Foster*, 394 at 443.

Based on the record, and this Court's authorities, the Circuit correctly determined "*a conclusion by the state court*" that counsel's representation was not deficient *was* "*not reasonable*" "in light of . . . the merits of the motion to suppress Esho's identification testimony as the product of suggestion." Pet. App. 7a, citing *Kimmelman*, 477 U.S. at 385-86.

Petitioner claims there is "no sound basis for concluding that either photo identification procedure with Esho was marred by police practices that were either

unnecessary or suggestive – let alone 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Pet. 13.

This Court's authority and the record are to the contrary.

a. The first lineup procedure was more suggestive than in *Foster*.

In *Foster*, the police first showed Foster to the manager in a three-man lineup two days after the robbery. *Foster*, 394 U.S. at 441. The manager "thought" Foster was one of the robbers, but was unsure. *Id.* The lineup was suggestive because Foster was significantly taller than the other two men. *Id.* The manager likely knew how tall the robbers were, so the lineup conveyed, "choose the closest."

Here, seventeen months (not two days) passed between the crime and when police showed Massey a lineup array that included Beaudreaux and told Massey to choose the "closest." ER 863. Police showed Esho an identical array the same day, but he did not positively identify Beaudreaux. ER 570-72, 637, 784, 925. He said Beaudreaux's photo was the "closest," but it "shows his face a little wider and his head a little higher." ER 571. Police here told Massey to choose the "closest," and Esho chose the "closest." While in *Foster*, the three-man lineup may have implied the manager should choose the closest, the only reasonable conclusion here is the procedure explicitly suggested it. Petitioner claims Esho made a "tentative" identification of Beaudreaux in the first array. Pet. 3, 14, 17. But, Esho testified he was "pretty sure" Beaudreaux was *not* the shooter at that point. ER 1174.

b. The second lineup procedure was more suggestive than in *Foster*.

In *Foster*, the manager viewed Foster a second time in person on the same day he viewed him in the first lineup, but was still unsure. *Foster*, 394 U.S. at 441.

Here, Esho was shown a second array with Beaudreaux's photo six hours after he saw the first one. ER 567-69, 637-38, 784-86, 789-99, 799-801. Esho again failed to positively identify Beaudreaux as the gunman. ER 568, 637-38, 786-87. Instead, he said, "I feel No. 2 [Beaudreaux] is very close, based on my recollection of the events that occurred the night Wayne was killed." ER 568, 625-26, 713.

The procedures here were impermissible suggestive because Esho testified it was obvious Beaudreaux was the suspect because he recognized Beaudreaux from the first array, and he might have "relied" on the first array, to pick Beaudreaux in the second. ER 673. Esho didn't do it "on purpose," "it might just be a thing that happens unconsciously." ER 673. Even the police knew the procedure was not the best practice. Officer Murphy admitted the lineup sequence Detective Sabins employed with Esho "was an unusual thing because they are not trained to go back and try it again if they can get an idea earlier in the day." ER 926-27. And, Detective Sabins admitted it was not common practice to show the same witness two different lineups including the same person at different times. ER 802.

Petitioner claims the police showed Esho a photo of Beaudreaux taken closer to the time of the shooting. Pet. 13-14. But, that does not alter the calculus because recurrence of Beaudreaux in successive lineups suggested he was the gunman and committed Esho to identifying him once he saw him in court. Police knew they needed corroboration for Crowder's identification, and knew Esho would see Beaudreaux at the preliminary hearing and it would be obvious Crowder identified Beaudreaux. Even if the procedure was in good faith, it was unduly suggestive.

c. As in *Foster*: The third time was a charm.

The manager in *Foster* became convinced Foster was one of the robbers when he saw Foster a third time. *Foster,* 394 U.S. at 441-42.

Esho identified Beaudreaux when he saw him a third time during the preliminary hearing, but with one important difference: Esho saw Beaudreaux in court as a defendant alongside his old friend, Crowder, who had obviously identified Beaudreaux as the gunman. ER 639, 645-49, 1147, 1180-82. This was far more suggestive than the situation in *Foster.*[5] It was "obvious" Beaudreaux was arrested as the gunman and Esho "figured he [Beaudreaux] was the man." ER 1181-82. Like the manager in *Foster,* Esho identified Beaudreaux upon seeing him a third time, after he was conditioned to do so by previous viewings. Pet. App. 4a.

Petitioner contends the Circuit erroneously relied on its own authority, contrary to *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (per curiam). Pet. 14. In *Parker,* the Circuit decision repetitively relied on its own circuit precedent "rather than" this Court's well-established authorities. *Id.* at 49. This Court held, "circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court," and "cannot form the basis for habeas relief under AEDPA." *Id.* at 48-49. It was error for the Circuit there to consult its own precedents "rather than"

---

[5] "It is deeply ingrained in human nature to agree with the expressed opinions of others particularly others who should be more knowledgeable when making a difficult decision." *Manson v. Brathwaite,* 432 U.S. 98, 134 (1977) (Marshall, J., Brennan, J.) (dissenting) (citing e. g., *United States v. Wade* 388 U.S. 218, 228-229 (1967) [other citations omitted].).

those of this Court for purposes of AEDPA. *Id.* at 48. This Circuit's decision did not rely on its own authorities "rather than" this Court's well-established authorities. Pet. 1a-7a.

Petitioner claims the Circuit relied on *Johnson v. Sublett*, 63 F.3d 926 (9th Cir. 1995), but the Circuit relied on *Simmons and Foster*. Pet. App. 4a, citing *Foster*, 394 U.S. at 442-43. *Sublett* merely illustrated the obvious: Courtroom procedures can be suggestive, such as here, although not in *Sublett*. Pet. App. 4a.

2. Fair-minded jurists must agree Esho's identification was not independently reliable.

Under *Biggers*, when considering the second part of the *Simmons* test and determining whether identification evidence is sufficiently reliable to go to the jury despite pretrial suggestive procedures under the "totality of the circumstances," a court considers: (1) the witness's opportunity to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness's prior description, (4) the level of certainty demonstrated at confrontation, and (5) the time between the crime and confrontation. Pet. App. 5a, relying on *Biggers*, 409 U.S. at 199-200.

The Circuit here correctly considered whether the state courts could reasonably find Esho's identification sufficiently reliable despite the suggestive procedures, such that a motion to exclude Esho's identification lacked merit, as *Kimmelman* requires to satisfy the *Strickland* deficiency prong. Pet. App. 5a, relying on *Biggers*, 409 U.S. 188.

a. Two years passed between the shooting and the identification.

In *Foster,* the night manager saw Foster twice in one day only two days after the robbery, and a third time a week to ten days later. *Foster,* 394 U.S. 440-41. Here, Esho never saw the gunman before 1:30 a.m. the night of the incident. Seventeen months later, he saw two photos of Beaudreaux, but failed to positively identify him as the gunman. More than three years after the shooting, and after having seen his face twice, he identified Beaudreaux at the preliminary hearing. The Circuit correctly found the only reasonable conclusion is the third *Biggers* factor favors an unreliable identification. Pet. App. 5a.

b. Esho's initial description did not match Beaudreaux.

Esho never met or saw the gunman until moments before the struggle over the gun in the dark, and had no independent memory of the gunman upon which to base his description or identification. ER 565. His initial description of the gunman does not match Beaudreaux. ER 658. He told police the gunman was his own height (6' 1"), but admitted Beaudreaux is significantly shorter. ER 564-66, 655-59; Trial Exhibit 18. He initially described the gunman as having a darker complexion than his own, but backed away from that at trial, saying Beaudreaux's complexion was "medium." ER 656-57. The Circuit determined the only reasonable conclusion is the fourth *Biggers* factor favored unreliability. Pet. App. 5a.

c. Esho was uncertain until after repeated exposure to Beaudreaux's face and until he saw Beaudreaux in court alongside his friend, Crowder, who had obviously identified Beaudreaux as the gunman.

Esho's level of certainty was similar to the night manager in *Foster.* In each case, neither of them was certain the defendant was the man during the first or

second viewings. The third time, however, each became certain the defendant was the man. *Foster* threw out the night manager's identification because it was unreliable under these circumstances. *Foster,* 394 U.S. 442-43.

Here, Esho never met or saw the gunman until moments before the struggle over the gun in the dark, so he had no independent memory of the gunman. ER 565. His description on the day of the shooting, when he said his memory was best, does not match Beaudreaux. ER 658, 661. He saw two lineup arrays seventeen months after the shooting, but did not say Beaudreaux was probably the gunman. ER 567-72. He merely said his photo was the "closest" of six, and "very close." ER 567-72. He did not independently recall Beaudreaux as the gunman. ER 569-72. The third time he saw Beaudreaux, it was obvious Beaudreaux was charged as the gunman. ER 672-73, 1181-82. It was also obvious to Esho that his friend, the accomplice Crowder, had identified Beaudreaux. ER 672-73, 1181-82.

The only reasonable conclusion is Esho's confidence was the product of the suggestive police procedures rather than his independent recollection. As the Circuit found, "Esho's initial identifications evinced considerable uncertainty; only after repeated exposure to Beaudreaux's photograph did Esho positively identify him at the preliminary hearing, itself a suggestive situation." Pet. App. 5a.

Petitioner claims Esho was certain because he testified he recognized "sort of the way that he walked." Pet. 15; ER 284-85, 649. But, Esho did not testify he recognized Beaudreaux's walk when he identified Beaudreaux at the preliminary hearing. ER 1146. Esho mentioned the walk three years after the shooting during

trial. At the preliminary hearing, he failed to identify anything distinctive or unusual about Beaudreaux's walk and testified there was nothing unusual or distinctive about the gunman. ER 285, 1166-67. His testimony on this point also lacks foundation: (1) He never saw the gunman before the night of the crime, (2) He testified the gunman was behind Crowder when he first saw Crowder tap the man, (3) the gunman was behind him when they went around the corner from Blake's, and (4) he was behind the gunman when he and the gunman followed Drummond. ER 565, 601-03, 617-18, 625, 899-901, 1149-50, 1153, 1176, 1179.

In sum, the Circuit correctly held, "a conclusion by the state court" that counsel's "representation was not deficient was not reasonable," "in light of the merits of the motion to suppress, the importance of the evidence subject to suppression, the lack of any apparent tactical advantage in declining to raise the issue," and counsel's "declaration that he recalled no strategic motives," for failing to object or move to exclude Esho's identification testimony as the product of impermissibly suggestive photographic identification procedures under the totality of the circumstances. Pet. App. 2a-5a, 7a.

d. The Circuit deferred to the state courts when it found Esho had a good opportunity to view the gunman.

Beaudreaux contends it is unreasonable to find Esho had a good opportunity to see the gunman because he (1) had never seen the gunman before the night of the crime, (2) did not "focus" on the gunman, (3) was behind the gunman when Drummond ran away until he came up alongside him and told him to leave them alone, (4) the gunman was behind Crowder when Esho first notice him, and (5) the

gunman was behind Esho when Crowder and Drummond went around the corner to fight. ER 565, 601-03, 617-18, 625, 899-901, 1149-50, 1153, 1176, 1179. The Circuit, however, deferred to the state courts finding it reasonable to conclude Esho had a good opportunity to view the gunman the night of the shooting. Pet. App. 5a.

e. The Circuit deferred to the state courts when it found Esho paid close attention.

Beaudreaux contends it is also unreasonable to conclude Esho paid close attention to the gunman because he was focused on the fight and the gun, and did not focus on the gunman's face. ER 677. He never saw the gunman before, and he concentrated on separating Drummond and Crowder. ER 565, 1159-61. He was more drunk than sober that night, the gunman's appearance came as a complete surprise to him, and he "froze" when he saw the gun (commonly known as "weapon focus") so much so that he says he saw the man's finger pull the trigger. ER 614, 676-77, 1151. At the preliminary hearing, he did not remember his description of the gunman from the night of the shooting. ER 1166. And, he admitted his description did not match Beaudreaux. The Circuit, however, gave deference to the state courts by concluding Esho paid close attention to the gunman. Pet. App. 5a.

E. The Circuit correctly applied AEDPA review to the *Strickland* prejudice prong.

Petitioner claims Beaudreaux must show a reasonable probability of acquittal. Pet. 16. Not so. A defendant making a *Strickland* claim must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Pet. App. 5a, citing *Strickland*, 466 U.S. at 694 (a reasonable probability is a probability sufficient to undermine confidence in

the outcome). Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Reviewing courts must "consider the totality of the evidence," including the strength of the evidence supporting the verdict. *Id.* at 694. A *Strickland* claim under AEDPA, requires a substantial, not just conceivable, likelihood of a different result. *Pinholster,* 563 U.S. at 189 (citing *Richter,* 562 U.S. at 112) (citing *Strickland,* 466 U.S. at 694).

The Circuit applied AEDPA review to the *Strickland* prejudice prong and determined, "the only reasonable conclusion, given the weakness of the state's case and the critical importance of Esho's identification, is that a more favorable verdict was 'reasonably likely' absent the ineffective representation." Pet. App. 7a, citing *Strickland,* 466 U.S. at 696 and 28 U.S.C. § 2254(d)(1).

1. Esho's identification was critical to the state's case.

Like the conviction in *Foster,* Beaudreaux's conviction rested on three evidentiary components: (1) Crowder's accomplice testimony; (2) Esho's eyewitness testimony, and (3) a largely inaudible and unintelligible recording attributed to Beaudreaux that does not contain a confession. *Foster,* 394 U.S. at 444.

The Circuit considered prejudice based on the credibility of Crowder versus Esho, and found the only reasonable conclusion the state courts could draw on this record is Beaudreaux was prejudiced by counsel's failure to move to exclude Esho's identification testimony given that Esho enjoyed greater credibility than did Crowder. Pet. App. 5a-7a. Crowder "was likely not regarded as a credible witness" since the record demonstrates he "lied to police over the course of several interrogations regarding the crime at issue," "cooperated only after he had been

arrested and charged with a separate crime," "was himself charged with Drummond's murder," and "testified against Beaudreaux pursuant to a plea agreement in which he pled no contest to the lesser offense of voluntary manslaughter and received a sentence of probation, with no prison term." Pet. App. 6a. Esho, "[i]n contrast to Crowder, a known liar and criminal offender with a strong incentive to identify Beaudreaux as the killer," "had no criminal record, and his testimony was not induced by any deal with the government." Pet. App. 6a.

The Circuit correctly concluded, "[t]he only reasonable conclusion given the weakness of the state's case and the critical importance of Esho's identification, is a more favorable verdict was 'reasonably likely' absent the ineffective representation. Pet. App. 7a, relying on *Strickland*, 466 U.S. at 696 and 28 U.S.C.§ 2254(d)(1).

Additionally, as in *Foster*, Beaudreaux's jury had to determine if Crowder was an accomplice and if so, his identification had to be disregarded under California Penal Code §1111 unless there was independent corroborating evidence of the identification. ER 578 562. Had Esho's identification been excluded, as it should have been, it is conceivable the jury would have determined Crowder was an accomplice without requisite corroboration and disregarded his identification.

2. Massey did not corroborate the identification of Beaudreaux.

Petitioner complains the Circuit failed to consider Massey's testimony, which it characterizes as a "probable identification." Pet. 17. It is not objectively reasonable to conclude Massey made a probable identification. Massey initially told police he would not be able to identify the gunman. ER 862-63. Seventeen months

later, he failed to identify Beaudreaux in a lineup array, and told police he "never really focused on the person who shot Wayne." ER 787-788, 802-806, 852-53, 922-23, 1121-22. Two days later, seeing a second photo of Beaudreaux, he said the photo had "similar characteristics." ER 788-90, 840-44, 853- 55. At trial, Massey testified he did "not know" whether Beaudreaux was the gunman or not:

> Q: Are you saying he may have been the person, he may not have; *you just don't know*?
>
> A: Yes.

ER 844 (emphasis added).

3. The recording provides no objectively reasonable basis to infer consciousness of guilt.

The Circuit's decision gave deference to the state courts about the recording by acknowledging the "largely inaudible" recording of statements attributed to Beaudreaux in a police van transporting him and Crowder to prison, "is certainly persuasive evidence that Beaudreaux was extremely angry at Crowder." Pet. App. 6a-7a. But, as the Circuit correctly concluded, "there was no statement in the recording revealing whether Beaudreaux was livid because he had committed the murder or because he had not and was being falsely identified." Pet. App. 6a.

The Circuit's conclusion is supported by the recording itself. The recording (Trial Exhibit 23) was admitted as evidence, but not the transcript (Trial Exhibit 23A), which was only briefly permitted as an aid to the jury. ER 679, 700-01, 704-05, 915-16. The recording is largely inaudible. The words attributed to Beaudreaux are missing context in many places, i.e., there a few words and nothing intelligible, followed by some words, followed by something unintelligible. Trial Exhibit 23.

There are not enough audible, intelligible, complete sentences in the recording to draw any conclusions about why Beaudreaux was angry. The isolated words attributed to Beaudreaux fail to provide a basis upon which objectively reasonably fair-minded jurists can infer Beaudreaux identified himself as the gunman.

Petitioner claims if this is a close call, the state courts are entitled to the benefit of the doubt. Pet. 17. But, this is not a close call. Listening to the recording in the light most favorable to the prosecution, there are no complete audible and intelligible spoken sentences that provide any objectively reasonable basis to infer Beaudreaux acknowledged he was the shooter or exhibited consciousness of guilt.

Petitioner claims Crowder's testimony "was corroborated by other evidence that the state court reasonably could deem significant," claiming it "reasonably could have construed" the comments in the prison van recording as "strong evidence that Beaudreaux had committed the murder. . ." Pet. 17. But, if fair-minded jurists listen to the recording, they must all agree the recording provides no objectively reasonable basis to conclude the recording identifies Beaudreaux as the shooter or articulates consciousness of guilt. As the Circuit stated, the only reasonable conclusion to be drawn from the recording is, "[i]f the jury was not convinced by Crowder's testimony identifying Beaudreaux, there is a reasonable probability that it would have regarded the recorded conversation as insufficient to conclude beyond a reasonable doubt that Beaudreaux was the murderer." Pet. App. 6a. The only *reasonable* conclusion fair-minded jurist can reach is the recording "was not enough" "to dissipate the prejudice related to Esho's identification." *Id.*

F. Summary disposition is inappropriate.

Petitioner suggests this Court "may wish to consider summary reversal." Pet. 10. Summary disposition is inappropriate. The Circuit accurately stated and faithfully applied the limitations on its authority under AEDPA and thoroughly considered the state court record in detail in light of this Court's relevant well-established authorities before drawing its conclusions. Pet. App. 1a-7a. Moreover, the cases petitioner relies on for summary reversal are materially distinguishable. Pet. 10. Unlike *Felkner v. Jackson*, 562 U.S. 594 (2011)(per curiam), the Circuit here used the appropriate AEDPA standards for review and carefully discussed the facts. Pet. App. 1a-7a. Unlike *Cavazos v. Smith*, 565 U.S. 1 (2011) (per curiam), the Circuit here relied on this Court's well-established authorities rather than its own precedent and gave AEDPA deference to counsel and the state courts. Unlike *McDaniel v. Brown*, 558 U.S. 120 (2010) (per curiam), the Circuit based its conclusion on the state court record. Unlike in *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam), counsel here negligently and prejudicially failed to move to exclude unreliable identification testimony.

CONCLUSION

This court should deny certiorari.

DATED: March 9, 2018

Respectfully submitted,

_____

Jamie Lee Moore
Counsel of Record
Attorney for Respondent
Nicholas Beaudreaux

Jamie Lee Moore
Counsel of Record
Attorney at Law
700 Larkspur Landing Circle, Suite 199
Larkspur, CA 94939
(415) 272-2772
FedAppeal@yahoo.com
Attorney for Respondent
Nicholas Beaudreaux

No. 17-1106

In the Supreme Court of the United States

MICHAEL SEXTON, WARDEN,

Petitioner,

v.

NICHOLAS BEAUDREAUX,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
PEGGY S. RUFFRA*
Supervising Deputy Attorney General
BRUCE ORTEGA
Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(415) 510-3855
Peggy.Ruffra@doj.ca.gov
**Counsel of Record*

March 27, 2018

TABLE OF CONTENTS

Page

Reply Brief for Petitioner 1

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Cullen v. Pinholster
563 U.S. 170 (2011) 2

Foster v. California
394 U.S. 440 (1969) 2, 3, 4, 8

Harrington v. Richter
562 U.S. 86 (2011) 1, 2, 7, 9

Hurles v. Ryan
706 F.3d 1021 (9th Cir. 2013) 1

Johnson v. Sublett
63 F.3d 926 (9th Cir. 1995) 7

Kimmelman v. Morrison
477 U.S. 365 (1986) 7

Manson v. Braithwaite
432 U.S. 98 (1977) 4

TABLE OF AUTHORITIES
(continued)

Page

Nevada v. Jackson
569 U.S. 505 (2013) (per curiam) 9

Perry v. New Hampshire
565 U.S. 228 (2012) 5, 8, 9

Simmons v. United States
390 U.S. 377 (1968) 4, 5

Strickland v. Washington
466 U.S. 668 (1984) 1

Woods v. Donald
135 S. Ct. 1372 (2015) (per curiam) 4

Yarborough v. Alvarado
541 U.S. 652 (2004) (per curiam) 5

STATUTES

28 U.S.C.
§ 2254 ..... 1, 2, 5, 8

REPLY BRIEF FOR PETITIONER

In disagreeing with the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984), to Beaudreaux's claim of ineffective assistance of counsel, the decision below purports to apply the deferential standard of review mandated by AEDPA, 28 U.S.C. § 2254(d). Contrary, however, to this Court's detailed explanation of that standard in *Harrington v. Richter*, 562 U.S. 86, 102 (2011), the decision fails to address, let alone refute, obvious arguments that fair-minded jurists could accept as reasonably supporting the state court's rejection of the *Strickland* claim. Instead of deferential review, the court of appeals conducted *de novo* review; and because it concluded that Beaudreaux's claim had merit, it held that the state court was unreasonable in rejecting the claim. That is the same error condemned by *Richter*.

None of Beaudreaux's arguments overcomes the court of appeals' fundamental error. They only highlight how far the decision below strays from AEDPA bounds.

1. Beaudreaux first argues that review is unwarranted because the court of appeals' decision is fact-bound, with few ramifications for other cases. Opp. 19. But it is the court of appeals' disregard of AEDPA that warrants review—as such errors have merited this Court's intervention in many prior cases. *See, e.g.*, *Hurles v. Ryan*, 706 F.3d 1021, 1050 & n.5 (9th Cir. 2013) (Ikuta, J., dissenting) (collecting cases). In *Richter*, this Court expressly condemned an approach identical to that taken by the court of appeals here. Just as in *Richter*, the decision below "all but ignore[s] 'the only question that matters under § 2254(d)(1).'" 562 U.S. at 102.

2. Beaudreaux asserts that the court of appeals "correctly stated and applied AEDPA deferential review." Opp. 19-20. But the court's opinion shows no *Richter* analysis. Only after completing its independent review of the *Strickland* claim, Pet. App. 1a-6a, does the panel majority even acknowledge its obligation to review the state court's rejection of the claim with double deference. *Id.* at 6a-7a (citing *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). Then, in deeming the state court decision unreasonable, it relies only on the reasons given for its own *de novo* judgment that Beaudreaux's ineffective-assistance claim has merit. It never mentions or discusses the essential *Richter* and AEDPA consideration of whether there nonetheless are reasonable arguments supporting the state court decision on which a fair-minded jurist could deem counsel's performance competent, the identification procedures not unduly suggestive, and Esho's testimony reliable.

As in *Richter*, "[t]he Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review." 562 U.S. at 102. That approach—relying on a *de novo Strickland* analysis and then giving lip service to AEDPA deference as an afterthought—once again has resulted in sidestepping § 2254(d). *See id.* at 104.

3. a. Relying primarily on *Foster v. California*, 394 U.S. 440 (1969), Beaudreaux contends that the court of appeals correctly applied § 2254(d) to conclude that trial counsel could not reasonably have determined that a suppression motion would be unsuccessful. Opp. 23-31. But reasonable state court jurists could easily have concluded that *Foster* is dis-

tinguishable from this case and does not compel the suppression of Esho's identification of Beaudreaux.

In *Foster*, the police called the sole eyewitness to a robbery, Joseph David, to the stationhouse to view a live lineup. 394 U.S. at 441. There were three men in the lineup: Foster, a tall man who was almost six feet in height, and two other men who were short—5'5" or 5'6." *Id.* In addition, Foster wore a leather jacket in the lineup that was similar to the one David said he had observed underneath the coveralls worn by the robber. *Id.* This Court stated:

> After seeing this lineup, David could not positively identify petitioner as the robber. He "thought" he was the man, but he was not sure. David then asked to speak to petitioner and petitioner was brought into an office and sat across from David at a table. Except for prosecuting officials there was no one else in the room. Even after this one-to-one confrontation David still was uncertain whether petitioner was one of the robbers: "truthfully—I was not sure," he testified at trial. A week or 10 days later, the police arranged for David to view a second lineup. There were five men in that lineup. Petitioner was the only person in the second lineup who had appeared in the first lineup. This time David was "convinced" petitioner was the man.

Id. at 441-442.

This Court held that this series of police-arranged physical encounters between the eyewitness and the suspect constituted "a compelling example of unfair lineup procedures." *Foster*, 394 U.S. at 442-443. The unduly suggestive elements in each lineup "made it all but inevitable that David would identify petitioner," which "so undermined the relia-

bility of the eyewitness identification as to violate due process." *Id.* at 443.

The lineups in *Foster* involved multiple unduly suggestive elements: a pronounced height difference that made the defendant stand out; the defendant wearing clothes distinctive to that of the robber; and a final lineup occurring only after what appears to have been an extended one-on-one confrontation with the witness. Here, in contrast, Beaudreaux's main complaint was that photos of Beaudreaux's face—and different photos at that—appeared in two lineup displays. Fair-minded jurists could conclude that *Foster* does not require suppression in this case.

Moreover, *Foster* did not discuss photo lineups at all. It thus did not address "'the specific question presented by this case.'" *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam); *see id.* ("if the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases"). [1] Indeed, Beaudreaux acknowledges that habeas relief in this case might require what he calls a "reasonable extension" of this Court's precedents. Opp. 25. But the

[1] This Court has addressed photo identifications in two cases: *Manson v. Brathwaite*, 432 U.S. 98 (1977), where the witness was shown a single photo of the suspect, and *Simmons v. United States*, 390 U.S. 377 (1968), where witnesses were shown snapshots of the two suspects primarily in group photos obtained from a family member. Neither of those cases concerned the kind of six-person photo lineup generated by the police in this case. Moreover, the Court has affirmed that, despite various potential hazards involved with identification by photograph, "this procedure has been used widely and effectively in criminal law enforcement . . . . We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement." *Simmons*, 390 U.S. at 384.

Court has made clear that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision. . . . Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (per curiam).

b. In Beaudreaux's case, neither of the two February 2008 photo identification procedures conducted with witness Esho was marred by unconstitutionally suggestive police practices. Esho was shown two different photo lineups, with each including a significantly different photo of Beaudreaux. *See* Pet. App. 103a-104a. The necessity for the second photo lineup was justified by the police discovery of an earlier photo of Beaudreaux that was taken closer in time to the shooting. *See Simmons*, 390 U.S. at 384-385. The record contains no suggestion that the police told Esho that either photo array contained someone they had arrested, or that the police otherwise employed methods designed to convey that Beaudreaux was "the man" (*see Foster*, 394 U.S. at 442). Nor did the composition of either photo lineup intrinsically draw attention to Beaudreaux's picture. *See* Pet. App. 103a-104a. Under such circumstances, this Court has repeatedly held that a defendant's rights are sufficiently safeguarded through trial processes, including cross-examination, jury instructions, and the requirement that guilt be proved beyond a reasonable doubt. *Perry v. New Hampshire*, 565 U.S. 228, 233 (2012); *Simmons*, 390 U.S. at 384.

Beaudreaux argues that impermissible suggestiveness of the photo lineups is demonstrated by Esho's trial testimony that "it was obvious Beaudreaux was the suspect because he recognized

Beaudreaux from the first array, and he might have 'relied' on the first array, to pick Beaudreaux in the second." Opp. 29 (citing RT 748).[2] Esho, however, did not testify that he surmised Beaudreaux must be the suspect because Beaudreaux was in both lineups. Esho was asked at trial if seeing Beaudreaux in the second lineup made it "easy to pick him out." He testified, to the contrary, that it was the "same both times" and "I said the photo was pretty close." RT 748. Esho speculated that "maybe" he relied on the first photo lineup in picking Beaudreaux out in the second lineup later the same day, but said that it "might just be a thing that happens subconsciously. I don't know." *Id.* Asked twice if he testified that he recognized the second photo as being the "same guy" he had just identified in the prior lineup, Esho said he did not think he testified to that "exactly"; rather, he had said the person in the second photo "was very close" or "really close." *Id.* Far from Esho confirming

---

[2] The relevant exchange between defense counsel and Esho is as follows: "Q. Now, the second time you looked at a photograph of Mr. Beaudreaux, that was the same day you looked at the photograph of him earlier, isn't that correct? [¶] A. That's correct. [¶] Q. So on the second lineup, it was pretty easy to pick him out, because you had already seen the same guy earlier that day, right? [¶] A. I would say it was the same both times. I said it was pretty close. [¶] Q. Well, didn't you rely on the first lineup as an assistance in picking out Mr. Beaudreaux in the second lineup? [¶] A. Maybe. Not like on purpose. [¶] Q. What do you mean 'not on purpose'? [¶] A. It might just be a thing that happens subconsciously. I don't know. [¶] Q. Now, did you testify at the preliminary hearing that in the second lineup you recognized the photograph as being the same guy you had identified before? [¶] A. I just said he was very close. [¶] Q. Did you say that you recognized him in the second lineup, this photograph, as being the same guy you had just identified in the prior lineup? [¶] A. I think I said really close. I don't know if I said that exactly." RT 748.

that he identified Beaudreaux from repeated viewings of his photos, the reasonable inference from his testimony was that the two photos of Beaudreaux were each "pretty close" to the shooter, with the one closer in time to the shooting being "really close." Further, Esho became sure the gunman was Beaudreaux only upon seeing Beaudreaux in person at the preliminary hearing, where it "[j]ust basically clicked." Pet. App. 64a. At the preliminary hearing, Esho recognized both Beaudreaux's appearance and "[s]ort of the way that he walked." *Id.*

That testimony would not compel a reasonable state court jurist to conclude that the police used impermissibly suggestive identification procedures to procure Esho's identification of Beaudreaux. It instead supports the opposite conclusion. The entirety of that testimony reflects that Esho over time became more certain of his identification of Beaudreaux as the gunman after he saw a recent photo, then a photo taken nearer in time to the shooting, then Beaudreaux in person. Therefore, the state court could have readily concluded that reasonable counsel would not have felt compelled to bring a motion challenging the identifications under these facts, or that such a motion in any event would not have been meritorious. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Richter*, 562 U.S. at 105 (habeas review of *Strickland* claim is "doubly" deferential).

c. Beaudreaux also endorses (Opp. 30-31) the court of appeal's contention that "[c]ourtroom procedures such as the defendant's preliminary hearing are 'undoubtedly suggestive' as to the defendant's identity as the perpetrator." Pet. App. 4a, citing *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995),

and *Foster v. California*, 394 U.S. at 443.[3] However, this Court has never held that a court proceeding itself may demonstrate unconstitutional suggestiveness. *Foster* concluded that the police-initiated lineups and one-on-one confrontation in that case amounted to a "compelling example of unfair lineup procedures," 394 U.S. at 442, but it did not include the witness's subsequent identification of Foster *in the courtroom* in that criticism.

To the contrary, in *Perry v. New Hampshire* the Court held that the due process check on the admission of eyewitness identification is applicable only when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime, "for example, at a lineup, showup, or photograph array." 565 U.S. at 232-233. In rejecting the notion that courts may exclude non-police-arranged identifications, the Court acknowledged, "Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do." *Id.* at 244. Nevertheless, it held that the due process test of reliability "comes into play only after the defendant establishes improper police conduct." *Id.* at 241. "When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.*

---

[3] As noted in the petition (at 14), *Johnson*, as a circuit court decision, does not qualify as "clearly established Federal law" under 28 U.S.C. § 2254(d)(1).

at 233. Thus, the preliminary hearing itself in this case cannot be considered a "third strike" establishing unconstitutional suggestiveness. More to the point, the federal habeas court was required to consider whether arguments that could have supported the state court's conclusion were inconsistent with a prior holding by this Court. *Richter*, 562 U.S. at 102. On the heels of *Perry*, a state court decision that a motion to suppress would not have succeeded because the only police-arranged identification procedures, the two photo lineups, were not unduly suggestive could not be deemed an unreasonable application of this Court's precedent.

4. Finally, Beaudreaux argues that a summary disposition would be inappropriate. Opp. 40. He suggests that prior cases in which this Court has summarily reversed are "materially distinguishable" from the present case. *Id.*

In this case, the court of appeals has repeated the error that this Court summarily corrected in *Richter*. That the Court has also summarily reversed decisions that failed to apply AEDPA in somewhat different ways does not make summary disposition any less appropriate. Once again, the decision below clearly "collapses the distinction between an 'unreasonable application of federal law' and what the majority believes to be an incorrect or erroneous application of federal law." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam). Summary reversal is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
BRUCE ORTEGA
Deputy Attorney General

March 27, 2018